FAR 52.217-8: Is It Really An Option?

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Disclaimer

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Abstract of Thesis

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GAO's 2009 decisions in *Major Contracting Services, Inc.* and the reconsideration decision threw the contracting community, specifically the DoD, into a frenzy with regards to the use and application of FAR 52.217-8, Extension of Services. The decision called for agencies to specifically evaluate FAR 52.217-8 extensions as a part of the initial competition. As the Army's request to reconsider GAO's initial decision and its request to open a FAR case suggest, a separate evaluation of the clause was not something agencies were in the practice of doing. This was mainly because the FAR provided no guidance as to how to conduct evaluations of an extension that may not be used and for a period of performance that could not be determined during initial competition.

The decisions of the Court of Appeals for the Federal Circuit, the Court of Federal Claims, and the Armed Services Board of Contract Appeals also contained no guidance with respect to the evaluation of FAR 52.217-8 clauses. In fact, they all previously upheld the agency's use of the rates from a preceding option period as valid exercises of FAR 52.217-8. The decisions are silent with regards to the particular evaluation of the clause and seem to be in conflict with GAO's opinion.

This thesis explores the history of the clause and the unsuccessful efforts to revise both the FAR and DFARS, which only showcase the confusion with regards to the proper application and use of FAR 52.217-8. Instead of providing contracting officers a simpler solution for extending service contracts, the revision efforts were stifled by the

contracting community's inability to agree on the proper use of the clause. Specifically, the standstill concerned proposed limitations on the use of the clause.

Another FAR revision is needed if the drafters' original intent of FAR 52.217-8 is to survive. This revision must remove the current ambiguity that exists within the clause, and its associated clauses, so that contracting officers may effectively use the extension as originally intended. This revision must be narrowly focused and must avoid placing any additional limitations on the clause or on the contracting officers' ability to use the clause.

Although many people in the contacting community believe placing additional limitations on the clause's use is necessary to prevent overuse and to encourage more efficient procurement processes, doing so will only lead to more inefficiencies in the administration of service contracts and may create an atmosphere where contracting officers are hesitant to exercise discretion. The goal should be to assist contracting officers in complying with the evaluation requirements that GAO held was necessary. Specifically, the goal in revising the clause must focus on clarifying "within the limits and at the rates specified in the contract" so that a proper evaluation may be conducted.

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I. INTRODUCTION

In 2009 the Government Accountability Office (GAO) changed the way the Department of Defense (DoD) handled contract extensions under the Federal Acquisition Regulation (FAR). In its decision in *Major Contracting Services*, the GAO called for the specific evaluation of the clause FAR 52.217-8, Option to Extend Services, as part of the initial competition. FAR 52.217-8, Option to Extend Services (Nov 1999), provides:

> The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The Option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within ___ [insert the period of time within which the Contracting Officer may exercise the option].

Such evaluation was not something federal agencies were in the practice of doing. This was mainly because the FAR provided no guidance as to how to conduct evaluations of extensions. Even today there exists confusion amongst DoD agencies as to how to accomplish an appropriate evaluation when the use of the clause, in addition to its pricing and period of performance, is uncertain.

This paper will explore the lack of specificity in the FAR with regards to the proper application and use of the clause. It will also take a look at the history of the clause, and associated clauses, in an attempt to better understand the drafters' intent. In

looking at the history, the paper will delve into the comments submitted prior to establishing the final rules for FAR 17.208,[1] FAR 37.111[2] and FAR 52.217-8.

The discussion will explore the issues surrounding the use of FAR 52.217-8 extensions in the decisions of the Court of Federal Claims, the Court of Appeals for the Federal Circuit, and the Armed Services Board of Contract Appeals. The paper will address why those decisions appear to be silent on the issue that the GAO honed in on. In doing so, the analysis will also attempt to address the proper application and use of the clause.

A close look into the revision efforts of the FAR and Defense Federal Acquisition Regulations Supplement (DFARS) will explore the problems surrounding consensus within the acquisition community in achieving compliance with GAO's decisions. The failure in the efforts to revise the existing regulations will highlight the underlying issues with the clause, and associated clauses, thus setting the stage for future remedial efforts to ensure compliance with GAO's 2009 decisions.

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[1] FAR 17.208(f) specifically provides, "Insert a clause substantially the same as the clause at 52.217-8, Option to Extend Services, in solicitations and contracts for services when the inclusion of an option is appropriate. (See 17.200, 17.202, and 37.111)."

[2] FAR 37.111, Extension of Services, states:

> Award of contracts for recurring and continuing service requirements are often delayed due to circumstances beyond the control of contacting 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 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. However, these rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance thereunder shall not exceed 6 months.

Finally, the paper will analyze the current problems surrounding the application of FAR 52.217-8. This analysis will give better insight into what needs to be done to remedy the current situation for appropriate use and application of FAR 52.217-8. Specifically, this remedy will need to come about in a revision to the FAR that is solely focused on clarifying its current language "within the limits and at the rates specified in the contract." Doing so will ensure that efficiency, a goal that the clause was originally meant to promote, is kept intact and that the discretion that was originally afforded to contracting officers is maintained—all in seeking to comply with GAO's 2009 opinions.

II. BACKGROUND

For those who believe in the power of the market place, competition motivates contractors to compete with one another in obtaining work often resulting in the best value to the government in the form of better prices, quality, and contract terms and conditions.[3] Maximizing competition by encouraging participation by a wide pool of potential competitors helps to ensure the government receives the best value.[4] On the other hand, our federal procurement system has placed an increasing emphasis on obtaining "customer satisfaction" for the government's end users over the years.[5] The cost and effort required in ensuring maximum competition is often countered, and many times sacrificed, by the federal government's need for supplies and services without delay.

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[3] Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Pub. Proc. L. Rev. 103 (2002).
[4] *Id.*
[5] *Id.*

A. FULL AND OPEN COMPETITION REQUIREMENTS UNDER THE COMPETITION IN CONTRACTING ACT

In 1984, Congress enacted the Competition in Contracting Act (CICA)[6] to increase competition in government contracting[7] and to impose more stringent restrictions on the award of noncompetitive, sole-source contracts.[8] CICA[9] requires "full and open competition" be used in sealed bid and competitive proposal procurements except when specifically exempt.[10] CICA further defines "full and open competition" to mean, "that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurements."[11] The Clinger-Cohen Act of 1996 § 4101 added new provisions to both 10 U.S.C. § 2304(j) and 41 U.S.C. § 3301(c) to

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[6] Pub. L. No. 98-369, Division B, Title VII §§ 2701-2753, 98 Stat. 494 (Jul. 18, 1984).
[7] Noting that opportunities for obtaining or improving competition have often been lost because of untimely, faulty, or the total lack of advance procurement planning. S. Rep. No. 50, 98th Cong., 2d Sess. 19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2192.
[8] Cont. & Fiscal L. Dep't, The Judge Advoc. Gen.'s Legal Center & Sch., U.S. Army, 165th contract Attorneys Course Deskbook, Ch. 5 para. II(A)(1) (Jul. 2012).
[9] CICA, as amended by the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994) and the Federal Acquisition Reform (Clinger-Cohen) Act of 1996, Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186, 642-79 (1996), is located in several titles throughout the United States Code. Title 10 U.S.C. contains various sections detailing the competition requirements that apply to the Department of Defense. Tile 41 U.S.C. contains various sections detailing the competition requirements applicable to civilian agencies.
[10] *See also* 10 U.S.C. § 2304(a)(1) and 41 U.S.C. § 3301(a)(1).
[11] 41 U.S.C. § 107 (previously 41 U.S.C. § 403(6)). *See also* John Cibinic, Jr., Ralph C. Nash & Christopher R. Yukins, Formation of Government Contracts, 294 (4th ed. 2011)[hereinafter, Cibinic, Nash & Yukins, Formation of Government Contracts].

require that the FAR ensure that "full and open competition" be implemented in a manner consistent with the need to efficiently fulfill the government's requirements.[12]

In enacting CICA, Congress explained that advance procurement planning and a sufficient understanding of the market place is key to effective competition.[13] Yet, acquisition planning is usually done in a "sporadic and fragmented manner" with requirements identified on a contract-by-contract basis.[14] This often results in less competition and higher prices.[15] This concept is easy to process when we look at our own personal purchasing habits. When we need to purchase something quickly, we often go to the first source we come across. Without researching other competitors in the same market, the chances of paying a higher rate are substantially increased. Yet in taking the time to research different prices along with weighing other factors, we are usually much satisfied as a consumer with the end product.

The FAR requires that contracting officers promote and provide for full and open competition in soliciting offers and awarding government contracts through the use of competitive procedures.[16] FAR Part 6 prescribes policies and procedures to promote full and open competition[17] in the acquisition process[18] as well as policies and

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[12] Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 295 (citing to the language in 2304(j) and 3301(c) as "The Federal Acquisition Regulation shall ensure…").
[13] *Id.* at 293 (citing S. Rep. No. 50, 98th Cong., 2d Sess. 18 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2191).
[14] *Id.*
[15] Schooner, *supra* note 1, at 12.
[16] FAR 6.101(a)-(b).
[17] *See* FAR Subpart 6.1.
[18] FAR 6.000.

procedures for both full and open competition after exclusion of sources[19] and other than full and open competition.[20] The FAR lays out these competitive procedures for the different source selections[21] as follows: sealed bidding,[22] competitive proposals,[23] combination of competitive procedures,[24] and other competitive procedures to include award of task orders under the General Services Administration's multiple award schedules.[25]

Government agencies generally cannot contract without providing for full and open competition unless there is a statutory exception. 10 U.S.C. § 2304(c) and 41 U.S.C. § 3304 each authorize agencies to contract without providing for full and open competition, but only under certain conditions.[26] Yet, a lack of advance planning and concerns over the availability of funds are not justifications for failure to provide for full and open competition.[27] In order to contract under one of these exceptions, an

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[19] *See* FAR Subpart 6.2.
[20] *See* FAR Subpart 6.3.
[21] *See* FAR 6.102.
[22] Contained in FAR Part 14.
[23] Contained in FAR Part 15.
[24] FAR 6.102(c) allows contacting officers to use any combination of competitive procedures if sealed bidding is not appropriate to include the use of two-step sealed bidding.
[25] *See* FAR 6.102(d).
[26] 10 U.S.C. § 2304(c), 41 U.S.C. § 3304, and FAR 6.302 lay out the statutory exceptions to full an open competition. These include 1) only one responsible source and no other supplies or services will satisfy agency requirements; 2) unusual and compelling urgency; 3) industrial mobilization; 4) international agreement; 5) authorized or required by statute; 6) national security; and 7) public interest.
[27] *See* 10 U.S.C. § 2304(f)(4)(A); 41 U.S.C. § 3304(e)(5)(A)(i); FAR 6.301(c).

agency must document[28] the reasons for using other than full and open competitive procedures[29] and obtain approval from the appropriate agency official.[30]

Congress has also created statutory exceptions to full and open competition in contingency contracting. For example, the National Defense Authorization Act for Fiscal Year 2008[31] authorizes set-asides[32] for goods or services from Iraq or Afghanistan.[33] However, the authority for use of such exceptions is generally temporary and may contain expiration dates.

Once the contracting office has met the competition requirements of FAR Part 6 on a contract, there is generally no need to conduct additional competition should the contracting office choose to exercise an option on that contract.[34] So long as the priced options are evaluated as part of the initial competition,[35] FAR Part 6 competition

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[28] The content for such documentation is laid out in FAR 6.303-2.
[29] 10 U.S.C § 2304(f)(1)(A); 41 U.S.C. § 3304(e)(1)(A); FAR 6.303-1(a).
[30] FAR 6.404 provides for the different levels of approval depending on the value of the contract.
[31] Pub. L. No. 110-181, § 886, 122 Stat. 3, 266 (Jan. 28, 2008).
[32] The FAR provides for setting aside acquisitions, or a class of acquisitions, for competition only amongst certain classes of businesses and under certain circumstances. These may be full or partial set-asides. *See, e.g.,* FAR 19.502-1 (small business set-asides).
[33] § 886 of the National Defense Authorization Act for Fiscal Year 2008, also known as the Iraq First and Afghanistan First programs, allows for limited competition amongst products or services from Iraq and Afghanistan for acquisitions in support of military operations or stability operations in those countries and under certain circumstances. *See also* Cont. & Fiscal L. Dep't, The Judge Advoc. Gen.'s Legal Center & Sch., U.S. Army, 165th contract Attorneys Course Deskbook, Ch. 5 para. II (E)(2)(e)(4)(a) (Jul. 2012).
[34] Options will be discussed in the next section.
[35] As long as the option is within the scope and under the terms of the original contract. FAR 6.001(c). *See also* FAR 17.207(f) which requires the contracting officer to make a written determination that exercising the option is in accordance with the competition requirements as prescribed in FAR Part 6 prior to exercising the option.

requirements do not need to be applied a second time.[36] The reason for this is that the exercise of priced options, pursuant to a modification, is considered an in-scope modification to a contract that was already subject to FAR Part 6.[37] However, FAR Part 6 does not address the applicability with regards to extensions.

B. OPTIONS DEFINED UNDER FAR 2.101

Part of the problem is that the FAR does not provide an explanation as to the differences between options and extensions. Options are defined under FAR 2.101 as 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 a contract, or may elect to extend the term of the contract." Options are, on the most basic level, extensions of a contract used to add additional quantities of work to the base contract or used to extend the contract's period of performance.[38] The benefit to the government in including options in a contract is that the government makes no binding commitment by including options in the contract and may choose not to exercise an option at all.[39] Though extensions under

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[36] FAR 17.207(f) requires the contracting officer make a written determination that an option has been evaluated as part of the initial competition, thus satisfying FAR Part 6 requirements.

[37] *See* Engineering & Prof'l Servs., Inc., B-289331 (Comp. Gen.), 2002 CPD ¶ 24 (Jan. 28, 2002)(holding that modifications beyond the scope of the original contract, absent a valid sole-source justification, are subject to the statutory requirements for competition).

[38] Most contracts are structured to include a base of a one-year period of performance with four one-year options. Though, as a general matter, a contract and all its options may not exceed five years. FAR 17.204(e) provides, "Unless otherwise provided in accordance with agency procedures, the total of the basic and option periods shall not exceed 5 years in the case of services, and the total of the basic and option quantities shall not exceed the requirement for 5 years in the case of supplies."

[39] However, if using an option FAR 17.204 requires that the contract specify the limits of such options to include quantity (if applicable), duration, and the period within which the option period may be exercised.

FAR 52.217-8 are treated as options,[40] options are not defined under FAR 2.101 to include such extensions, and FAR Part 6 is silent with regards to FAR 52.217-8.

Options are frequently used by contracting officers to extend contract performance after the base period has expired. However, this was not always the case. During the 1960s and 1970s options were infrequently used, and in 1962 the GAO tried to limit the use by capping option quantities at 25% of the contract and requiring that such options be exercised no more than 90 days after award.[41] Despite GAO's view that the best method for obtaining the best price was competitive bidding,[42] options became widely used during the acquisition streamlining efforts of the 1990s and are still widely used today in lieu of soliciting for new contracts each year.[43]

This is not to say option use is unlimited. Options tend to favor the government because the inclusion of an option clause in a contract is not a binding commitment, the government may unilaterally choose to exercise them, and if exercised, the contractor is required to perform.[44] As such, the FAR imposes certain limitations on the exercise of options. Specifically, FAR Subpart 17.2 lays out the policies and procedures for the government's use of options, including some limitations.[45] Yet despite these limitations,

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[40] *See* FAR 37.111(providing extensions as an "option clause").
[41] Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1407 (citing to Comptroller General to the Secretary of the Navy, 41 Comp. Gen. 682, B-148019, 1962 CPD ¶ 25 (Apr. 20, 1962) in which the GAO acknowledged that an option provision does not give the government any assurances that prices obtained pursuant to options will be the lowest once the time comes to exercise such option nor is it fair to bidders).
[42] *See* Comptroller General to the Secretary of the Navy, 41 Comp. Gen. 682, B-148019, 1962 CPD ¶ 25 at 688 (Apr. 20, 1962).
[43] Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1407.
[44] *Id.* at 1406-1407.
[45] Specifically, FAR 17.202(c) provides:

The contracting officer shall not employ options if—

there is little likelihood the government's decision to exercise options will be challenged.[46]

The one requirement that has been the subject of much consideration, and the focus of this paper, is the requirement that options be evaluated as part of the initial competition.[47] The FAR does not define "evaluation" nor does it set out the processes for doing so other than the requirement under FAR 52.217-5 that evaluations for award purposes be accomplished by adding the total price for all options to the total price for the basic requirement. Yet, it is unclear if this includes FAR 52.217-8 extensions. As we will see in the context of FAR 52.217-8, "evaluation" becomes problematic when the certainty of exercising the clause just does not exist at the time of solicitation or at contract formation and the period of performance is unknown.

C. TYPES OF OPTIONS

As stated above, options act as extensions of a contract (for either additional quantities of work or to extend the contract's period of performance) and the FAR does provide for different types of options. There are four standard option clauses in the

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(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.

[46] Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1409 (citing to Pools Moving & Storage, B-233563, 89-1 CPD ¶ 141 (Nov. 30, 1988)).
[47] *See* FAR 17.207(f).

FAR.[48] Two option clauses cover supply contracts: FAR 52.217-6, Option for Increased Quantity,[49] and FAR 52.217-7, Option for Increased Quantity—Separately Priced Line Item.[50] Both option clauses call for delivery of additional products after delivery of the basic contract units has ended.[51] The other two standard option clauses cover service contracts: FAR 52.217-8, Option to Extend Services,[52] and FAR 52.217-9, Option to Extend the Term of the Contract.[53]

Additionally, the DFARS[54] provides for two additional options: DFARS 252.217-7000, Exercise of Option to Fulfill Military Sales Commitments,[55] and DFARS 252.217-7001, Surge Option.[56] These clauses allow the government to order increased

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[48] Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1411.
[49] FAR 52.217-6 clause allows the government to increase the quantity of supplies ordered by structuring the option quantity as a percentage of the basic contract line item(s) or as additional quantities of the basic contract line item(s). Formation of Government Contracts, Fourth Edition, Cibinic, Nash, Yukins, Wolters Kluwer (2011) at 1411-1412.
[50] FAR ¶ 52.217-7 clause allows the government to require delivery of a numbered line item by structuring the option as a separate contract line item. at the quantity and at the price specified in the schedule. Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1412.
[51] Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1412.
[52] FAR 52.217-8 allows the government to obtain additional services for a period of up to six months if the award of a follow-on contract is delayed.
[53] FAR 52.217-9 allows the government to obtain services for additional periods of time.
[54] The DFARS is the Department of Defense's supplement to the FAR containing implementation of the FAR, requirements of law, DoD-wide policies, delegations of FAR authorities, deviation from FAR requirements, and policies/procedures that have a significant effect on the public. Defense Procurement and Acquisition Policy, About DFARS and PGI, a*vailable at* http://www.acq.osd.mil/dpap/dars/about_dfarspgi.html.
[55] DFARS 252.217-7000 allows the government the option to extend contracts to fulfill foreign military sales commitments.
[56] DFARS 252.217-7001 allows the government the ability to increase the amount of supplies or services called for under a contract or accelerate the rate of delivery at pre-established prices and rates. The clause also permits pre-pricing if the parties have included prices in the original contract.

deliveries to a "maximum sustainable rate" and generally call for pricing after the option is exercised.[57]

There is yet another type of option provided under the FAR that allows the government to require the contractor to provide phase-in training to a successor contractor—FAR 52.237-3, Continuity of Services Clause. This clause allows for continued and uninterrupted performance for period of up to 90 days under a contract for vital services where the government has a successor contract in place. The nature of the services required are determined between the parties and approved by the contracting officer.[58] Though this clause is not considered a standard option clause, and really goes beyond the mere extension of the contract, it does provide additional services for transitioning to a new contractor.[59]

D. FAR 37.111 EXTENSION OF SERVICES

As stated before, it is unclear if the requirements for options cover extensions under FAR 52.217-8; nonetheless FAR 37.111, Extension of Services, addresses when extensions to service contracts may be used. The purpose for extension of services is stated in the FAR. FAR 37.111 provides:

> 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

[57] Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1414.
[58] *See* FAR 52.237-3.
[59] *See infra* p. 31 and note 181.

> 17.208f(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. However, these rates may be adjusted only as a result of revisions to prevailing labor rats provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance thereunder shall not exceed 6 months.

The clause addresses extensions under these circumstances as an "option clause" and the apparent purpose of the clause is to provide a remedy for contracting offices in the event that occurrences outside their control prohibit timely award of services contracts. Yet as this paper will later address, a source of contention is what type of event constitutes a situation "outside the contracting office's control." The clause specifically provides examples of circumstances that would qualify for "beyond the control" of contracting offices, and thus qualify for an extension of a service contract. Though the clause specifically names delays caused by bid protests or mistakes in bid as examples, it is unclear whether the clause was intended to limit the circumstances in which the clause could be used. However, as this paper will also later discuss, there are some people in the contracting community who believe these are the only instances that merit an extension.[60]

Could circumstances "beyond the control of the contracting offices" merely be an event that is unforeseeable at the time of solicitation and contract award? If the goal was to streamline efforts instead of soliciting for new contracts every year,[61] the more

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[60] *See* discussion *infra* p. 47.
[61] *See supra* note 43 and accompanying text.

liberal interpretation would appear to give contracting officers discretion as to what constitutes an event beyond their control. On the other hand, some may prefer to read the clause to allow for such extensions only under circumstances of bid protests and alleged mistakes in bid.[62] The latter interpretation ultimately created a stalemate in revision efforts to the FAR and DFARS.[63]

One of the major problems identified with the use of such options is that they allow government agencies to avoid taking the necessary steps in the procurement process that allow for efficient procurements.[64] Though it is unclear exactly what steps are necessary for an efficient procurement (or if the same steps are necessary for every type of procurement), if a contracting office's current practices result in procurement processes of six months to a year, having an option that provides for additional years' work is certainly more attractive than continuously having to repeat the lengthy procurement process. If agencies did not have any options to exercise they would be forced to improve their current practices to ensure the time frame is significantly decreased.[65] Though the FAR provides the reasoning behind extensions—to provide an outlet for contacting offices when delay in award of a follow-on contract is due to circumstances beyond their control—if not used appropriately, the clause provides just another option to delay the procurement process for a follow-on contract. Yet who can

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[62] *See* FAR 37.111.
[63] *See* discussion *infra* Part VI.
[64] Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1411.
[65] *Id.*

blame contracting offices when the lengthy procurement process can take anywhere from six months to a year to complete?[66]

FAR 17.202(c) does impose some limitations on the contracting officer in employing options,[67] but there is nothing that specifically addresses contracting officers' discretion in determining circumstances "beyond the control of the contracting offices." FAR 37.111 itself does not impose any limitations on when a contracting officer can use the clause other than the requirement that the use of such extensions cannot exceed a total of six months when circumstances prohibit timely award of a new contract. So if limitations on such use are necessary for the promotion of more efficient procedures, as some critics would suggest,[68] then shouldn't the use of the FAR 52.217-8 clause come with more specific limitations? Or is the intent of the clause to allow contracting officers more discretion and flexibility in determining when its use is appropriate—such as in contingency contracting? Either way the lack of specificity may have the opposite effect so as to render use of the clause inefficient.

Furthermore, FAR 37.111 does not provide clear guidance as to the pricing for such options. The language states that performance of the services under the extension is "within the limits and at the rates specified in the contract."[69] If this is done in order to ensure performance is within the scope of the contract, the provision does not provide

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[66] *Ibid.*
[67] *See supra* note 45 and accompanying text.
[68] *See* Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1411 (acknowledging that where a procurement process can take six months to a year to complete, options are imperative for agencies who use inefficient procedures; thus limiting their use may motivate agencies to search for more efficient procedures to conduct new procurements).
[69] *See supra* at 9.

any specific guidance as to what exactly those limits are nor how to calculate the rates as specified in the contract. On the other hand, if this was done in order to allow for more flexibility given a contracting officer cannot write in every plausible situation in which an extension of services would be required, then why not state so?

E. FAR 17.208(F)

FAR 17.208(f) requires insertion of the clause 52.217-8, Option to Extend Services, or something similar when doing so is "appropriate."[70] Yet again, this clause provides no further guidance as to the use of FAR 52.217-8. It also does not set forth any limitations on the clause.

F. FAR 17.207(F)

In order to comply with the full and open competition requirement of FAR Part 6,[71] FAR 17.207 requires the contracting officer to ensure options are evaluated as part of the initial competition.[72] FAR 17.207 lacks specificity as to what an "evaluation" entails, but does provide examples for satisfying the second requirement for "an amount specified

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[70] FAR 17.208(f) states, "Insert a clause substantially the same as the clause at 52.217-8, Option to Extend Services, in solicitations and contracts for services when the inclusion of an option is appropriate (see 17.200 ,17.202, and 37.111)."

[71] FAR 17.207 (f) provides, in relevant part:

> Before exercising an option, the contracting officer shall make a written determination for the contract file that exercise is in accordance with the terms of the option, the requirements of this section, and Part 6. To satisfy requirements of Part 6 regarding full and open competition, the option must have been evaluated as part of the initial competition and be exercisable at an amount specified in or reasonably determinable from the terms of the basic contract, *e.g.*—
>
> > (1) A specific dollar amount;
> >
> > (2) An amount to be determined by applying provisions (or a formula) provided in the basic contract, but not including renegotiation of the price for work in a fixed-price type contract.
> >
> > ….

[72] *Id.*

in or reasonably determinable from the terms of the basic contract." These examples include the evaluation of either a specific dollar amount or an amount that can be gleaned from the basic contract.[73]

The problem is that agencies do not treat FAR 52.217-8 extensions and FAR 52.217-9 options the same in the evaluation stage. The reason may be that the terms under which FAR 52.217-9 are exercised are foreseeable at the time of contract formation, or at least the period of performance is foreseeable. Yet, the contracting officer will not know at what point he or she will need to exercise a 52.217-8 extension nor will he or she know the duration.

GAO has held that agencies must include a provision in the solicitation stating whether they intend to evaluate options.[74] Doing so allows offerors to make strategic decisions as to how they will structure their options.[75] Yet, it appears this is only done with regards to FAR 52.217-9 options,[76] which makes sense since neither the offeror nor contracting officer knows whether and at what point exercising a FAR 52.217-8 extension will be necessary since they are exercised under circumstances beyond the control of the contracting offices.

FAR 17.207 does not distinguish FAR 52.217-8 extensions from FAR 52.217-9 options nor does the FAR contain guidance on structuring options.[77] The FAR does contemplate instances when evaluations may be conducted either with or without option

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[73] *Id.*
[74] Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1415 (citing Golden N. Van Lines, Inc., 69 Comp. Gen. 610 (B-238874), 90-2 CPD ¶ 44).
[75] *Id.*
[76] *See* discussion *infra* Part V.A.
[77] Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1415.

prices included in the total evaluated price. If we look at FAR 17.208, paragraphs (a) (b) and (c) require inclusion of FAR 52.217-3, FAR 52.217-4, and FAR 52.217-5, respectively. FAR 52.217-3 is used when the government elects to exclude option pricing from the evaluation. FAR 52.217-4 is used when the government elects to evaluate option pricing along with the total price and the option(s) are exercised at the time of award.[78] FAR 52.217-5 is used when the government includes an option clause in the solicitation and does not exercise it at the time of contract award, but elects to evaluate the total price for all options to the total price for the basic requirement.[79] So if there is no clarification as to whether extensions under FAR 52.217-8 are included, presumably extensions would not be applicable since their exercise is not necessarily foreseeable at the time of contract award.

If extensions are not foreseeable and thus evaluation is impractical when compared to the evaluation of FAR 52.217-9 options with a set period of performance, then how can FAR 52.217-8 extensions comply with FAR 17.207 requirement that an "option" be evaluated as part of the initial competition? This is a question, as we will see, that has plagued the contracting community.

So if the goal is to ensure full and open competition, then why doesn't the FAR specifically require FAR 52.217-8 pricing be added to the total price in evaluating options? Is it even feasible for FAR 52.217-8 extensions and FAR 52.217-9 options to be

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[78] FAR 52.217-4 provides, "Except when it is determined in accordance with FAR 17.206(b) not to be in the Government's best interests, the Government will evaluate the total price for the basic requirement together with any option(s) exercised at the time of award."
[79] FAR 52.217-5 requires, "…the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate the Government to exercise the option(s)."

treated the same in the evaluation stage? Prior to the enactment of the Competition in Contracting Act, the GAO held that where an option price had not been evaluated in the making of the initial award, but instead added by a subsequent modification to the contract, the government should exercise the option according to the competitive norm of federal procurement.[80] Yet it remains unclear how this can be accomplished given extensions are rarely, if ever, foreseeable at the time of evaluation or contract award.

G. FAR 17.204

There is one instance in which FAR 52.217-8 extensions and FAR 52.217-9 options have been distinguished from one another. The Court of Appeals for the Federal Circuit (CAFC) has held that FAR 52.217-8 extensions did not conflict with the requirements of FAR 17.204 (a) or (e) even after the five year period, to include base year plus option years, had been exercised.[81] FAR 17.204(a) requires that the contract "specify limits on the purchase of additional supplies or services or the overall duration of the term of the contract, including any extension." Furthermore, paragraph (e) states, in relevant part, "Unless otherwise approved in accordance with agency procedures, the total of the basic and option periods shall not exceed 5 years in the case of services."

CAFC concluded that the purpose of FAR 52.217-8, allowing extension of services without negotiating short extensions when the award of a successor contractor is delayed, required extended service in addition to the five-year requirement under FAR

[80] The Ket, Inc. B-191949 (Comp. Gen.), 78-2 CPD ¶ 305 at 43 (Oct. 27, 1978) (stating that the requirement is that potentially interested suppliers be afforded adequate notice of and a fair opportunity to participate in the evaluation of their products and prices).
[81] *See infra* note 187 and accompanying discussion.

17.204.[82] So if there are instances where FAR 52.217-8 extensions are considered separate and distinct from FAR 52.217-9 options, might this reasoning be applied to the evaluation requirement under the FAR—especially in instances where evaluation of a FAR 52.217-8 extension is impractical given the uncertainty of its use at the time of evaluation and its duration?

H. APPLICABILITY OF FAR 52.217-8

So how has FAR 52.217-8 been applied and interpreted? The purpose of the FAR clause is to protect contracting agencies from being "forced to negotiate short extensions to existing contracts" within the limits and rates set forth in the contract.[83] As a unilateral action taken by the contracting officer, the risk to the contractor is that the clause increases the contractor's price risk since it binds the contractor to the rates set forth in the last option (or base year).[84] Yet the provision must be included in the solicitation so as to give the contractor notice that such an extension is possible. But the FAR does not specifically require pricing these extensions nor have contractors been in the practice of considering extensions in their option structures when submitting offers.

GAO has interpreted the purpose of the clause as "[providing] the agency with a right to seek an additional 6 months of contract performance…where exigent circumstances (such as delay in award of a follow-on contract)…"[85] As we will see, it is

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[82] *Id.*
[83] Federal Acquisition Regulation (FAR); Miscellaneous Amendments, 54 Fed. Reg. 29278-01 (Jul. 11, 1989).
[84] Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1413.
[85] Akal Security Inc., B-244386, 91-2 CPD ¶ 223 at 4 (Oct. 16, 1991).

the definition of "exigent circumstances" that has brought procurement professionals to a standstill in revision efforts to the FAR and DFARS.[86]

III. HISTORY OF FAR 52.217-8

In 1988 the DoD, General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) sought to revise the FAR[87] identifying a problem with the existing option clauses.[88] The option clauses current at that time did not address or remedy situations where award of recurring and continuing service contracts could be delayed due to circumstances beyond the control of the contracting offices.[89] Contracting officers needed a short-term remedy so they would not be forced to negotiate short extensions to existing service contracts pending resolution of those circumstances.[90]

A. FAR CASE 88-7

In response, the Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulatory Council (DARC)[91] opened up FAR Case 88-7[92] to address

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[86] *See* discussion *infra* Part VI.
[87] Statutory authorities to issue and revise the FAR have been delegated to the Procurement Executives in DoD, GSA, and NASA. Steven N. Tomanelli, *Historical Background* to Annotated Federal Acquisition Regulation Desk Reference, at ix, (Steven N. Tomanelli ed., Thomson Reuters 2013).
[88] Federal Acquisition Regulation (FAR); Options, 53 Fed. Reg. 3814-01 (Feb. 9, 1988).
[89] *Id.*
[90] *Id.*
[91] The Federal Acquisition Regulation is issued and maintained jointly, pursuant to the Office of Federal Procurement Policy Act of 1974 (Pub. L. 93-400), as amended by Pub. L. 96-83, through the coordinated action of two councils: the Defense Acquisition Regulation Council and the Civilian Agency Acquisition Council. The Chairperson of the DAR council is the Secretary of Defense and the Chairperson of the CAA is the Administrator of General Services. *Id. See also* 53 Fed. Reg. 3814-01.
[92] 41 U.S.C. 1707 governs the publication of the FAR and any regulation that has a significant effect beyond the internal operating procedures of the federal government or

this very issue.[93] The proposal cited to situations such as bid protests and mistakes in bids as examples constituting "circumstances beyond the control of the contracting offices."[94] Thus, the Councils considered changes to the FAR that would permit contracting offices to allow the government to require continued performance of any services within the limits and at the rates specified in the contract.[95]

The proposal included amending FAR 17.208,[96] adding FAR 37.111,[97] and amending FAR 52.217-8.[98] All comments by interested parties were to be submitted to the FAR Secretariat.[99]

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has a significant cost or administrative impact on contractors or offerors must be published in the Federal Register for public comment. The Administrative Procedures Act (5 U.S.C.§ 553), the law under which other Federal Agencies create regulations, does not govern FAR rulemaking. FAR Operating Guide, Version 5-5C (2011) at 4, *available at* http://www.acq.osd.mil/dpap/dars/docs/FAR_Operating_Guide_Version_5-5C_20111115.pdf. (last modified Nov. 15, 2011).

[93] 53 Fed. Reg. 3814-01; for procedures on opening and closing FAR cases, *see* Far Operating Guide, *supra* at 22.

[94] *Id.*

[95] *Id.*

[96] The proposed change revised paragraph (f) to read: "(f) The contracting officer shall insert a clause substantially the same as the clause at 52.217-8, Options to Extend Services, in solicitations and contracts for services when the inclusion of an option is appropriate. (See 17.000, 17.202, and 37.111)." *Id.* at 2.

[97] The proposed change added FAR 37.111 to read:

> 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 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. The option provision may be exercised more than once, but the total extension of performance thereunder shall not exceed six months.

Id. at 3.

B. COMMENTS FROM THE FIELD

The FAR Secretariat received a total of 27 responses from various governmental agencies and private sector companies.[100] The Department of Defense, through the DAR Council, took the lead in the case, considered all comments submitted in response to the changes and amendments.[101] The DAR Council then made a recommendation for concurrence on FAR Case 88-7 and forwarded the case to the CAA Council.[102]

Various agencies and companies favored the proposed changes and provided further suggestions. One comment coming from the private sector sought to include additional verbiage to the proposed FAR 37.111.[103] The suggestion was to add the phrase "of services" to the clause "the total extension of performance thereunder shall

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[98] FAR 52.217-8 was amended with a revision to the introductory text, "As prescribed in 17.208(f), insert a clause substantially as follows:" *Id* at 3. FOIA submission 263808 was sent by the author to GSA on January 24, 2014 in an attempt to acquire information regarding previous versions of FAR 52.217-8. On May 23, 2014 GSA responded with a limited release of information citing to statutory exemptions under 5 U.S.C. § 552(b)(5) and 5 U.S.C. § 552(b)(6). Ultimately, the information provided did not include the previous versions of FAR 52.217-8.

[99] GSA is responsible for establishing and operating the FAR Secretariat to print, publish, and distribute the FAR through the Code of Federal Regulations system. The FAR Secretariat also provides administrative support to the DAR and CAA Councils. Steven N. Tomanelli, *supra* at ix.

[100] *See* Letter from FAR Secretariat, to the Director, Defense Acquisition Regulatory Council (May 13, 1988)(copy on file with author); *see also* Letter from FAR Secretariat, to the Director, Defense Acquisition Regulatory Council (Jul. 8, 1988)(copy on file with author).

[101] Letter from FAR Secretariat, to the Director, Defense Acquisition Regulatory Council (May 13, 1988)(copy on file with author).

[102] *Id.*

[103] *See* Letter from American Defense Preparedness Association, to FAR Secretariat (Mar. 24, 1988) (copy on file with author).

not exceed six months."[104] The reasoning behind the inclusion was to clarify that the extension applied to the services rendered, rather than to the term of the contract.[105]

Some comments indicated a concern that FAR 37.111's terminology, as proposed, was too government friendly.[106] The private sector worried the wording gave the government a unilateral right to extend instead of the extension calling for a mutual agreement.[107]

There was also a concern within the private sector that the language "within the limits and at the rates specified in the contract"[108] would have an adverse impact on contractors.[109] Specifically, the concern was that prices for a contract are developed based on annual expectancies, but the actual costs of doing business vary from month to month.[110] Not only would the contractor have to bear excessive costs in months where the monthly expenses are on the high side, but this would also result in government paying too much for services during months where the monthly expenses are on the low side.[111]

Both the private sector and the federal agencies expressed additional concern that the same wording would not take current Department of Labor wage determinations into

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[104] *Id.*
[105] *Id.*
[106] The proposed version contained the following: "…which will enable the Government to require continued performance of any services…" *See supra* note 97.
[107] Letter from Professional Services Management Association, to FAR Secretariat (Apr. 6, 1998) (copy on file author).
[108] *See supra* note 97.
[109] Letter from Logistical Support, Inc., to FAR Secretariat (Mar. 30, 1988) (copy on file with author).
[110] *Id.*
[111] *Id.*

account,[112] thus requiring a price adjustment.[113] These concerns were ultimately addressed by the time the final rule was published.[114]

C. FORESHADOWING AMBIGUITY

One comment, which would remain unaddressed for over 20 years,[115] questioned the wording "at the rates specified in the contract." The concern was that the wording was ambiguous.[116] The comment referenced two possible meanings: 1) the rates that applied prior to the extension would continue to apply, resulting in losses to the contractor; or 2) the contract would specify the rates agreed to by the parties in the event the parties were to exercise the option, i.e. contractor's published commercial rates current at the time the option is exercised.[117]

This comment foreshadowed the current problem with the use of FAR 52.217-8 extensions. The proposed language for FAR 37.111 provided, "Examples of

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[112] Letter from U.S. Department of Labor, to FAR Secretariat (Mar. 9, 1988)(copy on file with author) (stating "As provided in 29 C.F.R. 4.4143(b), whenever the term of an existing contract is extended pursuant to an option clause or otherwise, the contract extension is considered to be a "new" contract for purposes of applying the labor standards provisions (and wage determinations) under the SCA. Thus, all such "new" contracts require the inclusion of a new or revised SCA wage determination in the contract extension…").

[113] *Id. See also* Letter from Lear Siegler Management Services Corp., to FAR Secretariat (Mar. 22, 1998)(copy on file with author); General Services Administration, Office of Acquisition Policy, to FAR Secretariat (Apr. 12, 1988)(copy on file with author); and Letter from Department of the Navy, Naval Facilities Engineering Command, to the FAR Secretariat (Apr. 27, 1988) (copy on file with author).

[114] *See* 54 Fed. Reg. 29278-01 (adding "However, these rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor" to the proposed rule).

[115] *See infra* note 226 and accompanying discussion.

[116] Letter from Data General, to FAR Secretariat (Apr. 5, 1988)(copy on file with author).

[117] *Id.*

circumstances causing such delays are bid protests and alleged mistakes in bid."[118] The same wording is still present in the current FAR 37.111. The comment recognized that the purpose of utilizing such extensions would not be achieved—i.e. avoiding short term negotiations—since the government would simply include the provision in all service solicitations, thus in effect delaying the negotiation of a short-term contract from 12-month intervals to 18-month intervals.[119]

D. OTHER COMMENTS

Some of the federal agencies believed the proposed FAR 37.111 would conflict with the limitation imposed by FAR 17.204(e).[120] One agency believed the length of time for the use of the option would only cause confusion when read in conjunction with FAR 17.200, 17.202, and 17.204(e),[121] while another believed FAR 17.204(e) should be changed to a 5 year plus 6 month limitation.[122]

In another comment, one agency addressed the confusion that may arise in having both FAR 52.217-8 and FAR 52.217-9 option clauses in the same contract.[123] FAR 52.217-9(c) allows the contracting officer to set a limit for the duration of the contract.[124] The comment points out that including both clauses would require the contracting officer

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[118] *See supra* note 97.
[119] *Id.*
[120] FAR 17.204(e) states, "The total of the basic and option period shall not exceed 5 years in the case of services." *See also* discussion *supra* at 16.
[121] Letter from U.S. Department of Justice, to FAR Secretariat (Mar. 10, 1988)(copy on file with author).
[122] Letter from U.S. Department of Transportation, to FAR Secretariat (Mar. 24, 1988)(copy on file with author).
[123] Letter from General Services Administration, Office of Acquisition Policy, to FAR Secretariat (Apr. 12, 1988) (copy on file with author).
[124] FAR 52.217-9(c) provides, "The total duration of this contract, including the exercise of any options under this clause, shall not exceed ____(months)(years)."

to delete the "under this clause" language to FAR 52.217-9 so that the total duration of the contract considered the potential 6 month extension period under FAR 52.217-8.[125]

The proposed interim rule replaced the "within the limits and at the rates specified in the contract" with "within the limits and at the rates stated in the Schedule."[126] However, the final rule published reverted back to "within the limits and at the rates specified in the contract."[127] As previously mentioned,[128] the final rule published for FAR 37.111 included a clause "However, these rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor."[129]

E. FURTHER REVISIONS

About a decade later, FAR 52.217-8 underwent another change. The DoD, GSA, and NASA sought to amend the clause to permit the contracting officer to insert a time frame within the clause for which the option could be exercised consistent with the format of the other options clauses: FAR 52.217-6, FAR 52.217-7, and FAR 52.217-9.[130] The amendment would have replaced the sentence "The Contracting Officer may exercise the option by written notice to the Contractor within the period specified in the Schedule" with "The Contracting Officer may exercise the option by written notice to the

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[125] Letter from General Services Administration, Office of Acquisition Policy, to FAR Secretariat (Apr. 12, 1988) at 2 (copy on file with author). *But see* Arko Executive Services, Inc., *infra* at 1380 (where the Court of Appeals for the Federal Circuit held that the limitations set under the FAR 52.217-9(c) clause only applied to options exercised specifically under FAR 52.217-9).
[126] Federal Acquisition Regulation (FAR); Miscellaneous Amendments, 54 Fed. Reg. 5052-01 at 17 (Jan. 31, 1989).
[127] 54 Fed. Reg. 29278-01 at 15.
[128] *See supra* note 114 and accompanying text.
[129] *Id.* at 12.
[130] Federal Acquisition Regulation; Option Clause Consistency, 64 Fed. Reg. 3618-01 at 1 (Jan. 22, 1999).

Contractor within [insert the period of time within which the Contracting Officer may exercise the option]."[131] The final published rule was changed slightly to read "The Contracting Officer may exercise the option by written notice to the Contractor within __ [insert the period of time within which the Contracting Officer may exercise the option]."[132]

IV. GAO, COFC/CAFC, AND ASBCA DECISIONS

The problem in the application of FAR 52.217-8 is that in recent years there has been confusion as to when and under what circumstances the clause may be used. As stated previously, the FAR lacks specificity with regards to the circumstances under which the clause may be used and its application. As a result, in practice the clause has been used by contracting officers as a means to add additional time on the performance of a contract.[133] The result is that "circumstances beyond the control of the contracting offices" has been diluted over the years[134] and may allow for more frequent use of the clause than originally intended, in effect showcasing the inefficiencies in the procurement process.[135]

This section will address the 2009 GAO decision and the reconsideration decision that led the procurement profession to question the government's current use and

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[131] *Id.* at 3.
[132] Federal Acquisition Regulation; Option Clause Consistency, 64 Fed. Reg. 51842-01 at 3 (Sep. 24, 1999).
[133] Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1410 (stating one of the disadvantages of options in general is that agencies tend to exercise options rather than conduct new procurements).
[134] *Id.* at 1413 (stating that agencies have been permitted to use the clause for other purposes other than for circumstances "beyond the control of contracting offices").
[135] *Id.* at 1411 (stating that the availability of options provides agencies with the ability to continue to use inefficient procurement procedures).

understanding of FAR 52.217-8. The decisions brought many of the issues raised over 20 years ago, but unaddressed, to the forefront only to be readdressed today, resulting in attempts to revise the FAR.[136]

A. GAO's 2009 DECISION IN MAJOR CONTRACTING SERVICES, INC.

On September 14, 2009, GAO issued a decision in *Major Contracting Services, Inc.*[137] This case concerned a protest of an extension to an Army-awarded contract for portable chemical toilet services. The request for quotations called for a set-aside for Service Disabled Veteran Owned Small Business Concerns (SDVO SBC) and the contract was awarded to DAV Prime/Vantex Service Joint Venture (DAV Prime JV) on May 28, 2008. The contract contained a base year with four one-year options. Included in the contract was the FAR 52.217-8 clause, Option to Extend Services (NOV 1999), which stated:

> The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not

[136] To date there has been no revision. *See* Memorandum from Office of the Assistant Secretary of the Army, Acquisition Logistics and Technology, to the Director, DAR Council, OUSD (AT&L), Subject: Request for FAR Case (Jan. 19, 2010) [hereinafter Army's Request for FAR Case] (copy on file with author).
[137] Major Contracting Services, Inc., B-401472 (Comp. Gen.), 2009 CPD ¶ 170 (Sep. 14, 2009), *recons. denied,* 2009 CPD ¶ 250.

exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within…*30 days of contract expiration*.[138]

Shortly after the Army awarded the contract to DAV Prime JV, Major Contracting Services, Inc. (MCS) challenged DAV Prime JV's eligibility as an SDVO SBC.[139] The Small Business Administration (SBA) sustained the protest, which was affirmed by the SBA Office of Hearings and Appeals (OHA). Despite the awardees ineligibility as an SDVO SBC, the Army did not terminate the contract, which prompted MCS to file a protest with GAO seeking termination of the awarded contract with DAV Prime JV. GAO found the SBA's regulations did not require the Army to terminate or suspend an award that had already been made.[140] Though in its opinion, GAO footnoted its recommendation that the agency further consider the appropriateness of exercising a future option under the contract with DAV Prime JV.[141]

Despite GAO's recommendation, the Army later sent out a notice of its intent to exercise an option under the contract to DAV Prime JV. However, the Army subsequently decided to resolicit the requirement and sent DAV Prime JV two letters: one rescinding its intent to renew the first option year, and the second notifying DAV

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[138] *Id.* at 1.
[139] FAR 19.302(c)(1) requires the contracting officer to forward protests challenging "small business" representation to the Small Business Administration's Government Contracting Area Office. GAO views the Small Business Administration as having conclusive authority in determining whether a particular business is "small" for purposes of federal procurement. Arbor Landscaping, Inc., B-231515 (Comp. Gen.), 88-1 CPD ¶ 564 (Jun. 13, 1988). As such, GAO will not make such a determination or review SBA's determinations. NJCT Corp., B-216919 (Comp. Gen.), 85-1 CPD ¶ 33 (Jan. 11, 1985).
[140] Major Contracting Services, Inc., B-400616, 2008 CPD ¶ 214 (Nov. 20, 2008)(holding that there is no requirement to terminate a contract after award if an awardee is found to be other than an SDVO SBC).
[141] *Id.* at 3 n. 3.

Prime JV of its intent to extend the contract under its authority under FAR 52.217-8 instead for a period of four months.[142] The Army included a justification for the sole-source extension[143] stating that a new award would not be completed in time to continue services and cited to FAR 17.207(c)'s requirement that the exercise of the option is the most advantageous method of filling the government's need, also citing to FAR Part 6.[144]

MCS filed its protest challenging the sole-source extension of DAV Prime JV's contract. Despite the Army's argument that the extension was outside GAO's jurisdiction,[145] GAO considered the protest on the allegation that the Army unreasonably, and in violation of law or regulation, exercised the option instead of conducting a new procurement.[146] GAO found that because the Army did not evaluate the option to extend under FAR 52.217-8 as part of the initial competition in accordance with FAR 17.207(f), the extension was beyond the scope of the contract and constituted a new procurement.[147] GAO went on to say that the Army failed to adequately plan for the procurement in

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[142] Major Contracting Servs., Inc., B-400616 at 3.

[143] Before exercising an option, FAR 17.207 requires the contracting officer determine 1) funds are available, 2) the requirement covered by the option fulfills an existing government need, 3) the exercise of the option is the most advantageous method of fulfilling the government's need, price and other factors [sic] considered [sic].

[144] *Id.* at 4.

[145] *See* 4 C.F.R. § 21.5(a). The regulation states that the administration of an existing contract is within the discretion of the agency and further requires disputes between the contractor and agency be resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978. GAO generally will not consider matters involving contract administration. *See* Neil R. Gross & Company, Inc., B-237434 (Comp. Gen.), 90-1 CPD ¶ 212 (Feb. 23 1990).

[146] Major Contracting Servs., Inc., B-400616 at 5.

[147] *Id.*

advance and should have conducted limited competition among qualified sources in accordance with FAR Subpart 6.3.[148]

In this particular case, and as GAO noted,[149] by the time the decision was issued, DAV Prime JV had already substantially performed under the four-month extension and the Army had already awarded the follow-on contract.

B. RECONSIDERATION DECISION

The Army sought reconsideration of GAO's decision, which was ultimately denied. The Army tried to distinguish the facts of the case from GAO's previous decision in the *Laidlaw*[150] case that GAO relied upon.[151] The Army argued *Laidlaw* dealt with inclusion of the FAR 52.217-8 that was added to the contract pursuant to a modification, and appropriately determined to be outside the scope; however, offerors in the case at bar were on notice that FAR 52.217-8 clause could be exercised since it was included in the request for quotations.[152]

In its denial GAO acknowledged that the *Laidlaw* facts were factually distinguishable, yet GAO's decision was based upon the requirements of FAR 17.207(f), thus not an error.[153] The Army had argued that GAO's reliance upon FAR 17.207(f)[154]

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[148] *Id.* at 7.
[149] *Id.*
[150] Laidlaw Envtl. Servs. (GS) Inc.; International Tech. Corp.-claim for Costs, B-249452 (Comp. Gen.), B-250377, B-250377.2, 92-2 CPD ¶ 366 (Nov. 23, 1992).
[151] Brief for Reconsideration, Protest of Major Contracting Services, Inc., B-401472, at 1-2 (Sept. 24, 2009).
[152] *Id.* at 3.
[153] *Id.*
[154] FAR 17.207(f) provides, in relevant part, "To satisfy requirements of Part 6 regarding full and open competition, the option must have been evaluated as part of the initial competition and be exercisable at an amount specified in or reasonably determinable from the terms of the basic contract…"

was unfounded since the protestor did not raise the issue.[155] Nonetheless, GAO maintained that its decision was based on the Army's failure to have evaluated the option as part of the initial competition under FAR 17.207(f).[156]

GAO further rejected the Army's argument that it, "basically conducted the equivalent of such an evaluation, to the extent practicable, when the Army evaluated the base year and option prices, which are the predicates upon which the price of an extension period would be based, depending upon when the extension was exercised" and that the option itself is "self executing."[157] The Army's argument relied on the presumption that the clause was self executing setting the limits already defined under the contract; that is, the limits under the base year or last option exercised depending on when the FAR 52.217-8 clause is exercised.[158] GAO was not persuaded by the Army's arguments.

GAO found that the Army's interpretation did not take into account the two separate requirements under FAR 17.207(f): that an option be evaluated as part of the initial competition AND be exercisable at an amount specified in or reasonably determinable from the terms of the basic contract.[159] GAO opined that solely satisfying the latter requirement[160] would render the former requirement meaningless and would be

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[155] *Id.* at 6.
[156] Dep't of the Army-Reconsideration*,* B-401472.2 at 3. (stating, "[I]n accordance with FAR sect. 17.207(f), the agency was required (but did not) reasonably justify the extension of the contract in accordance with FAR sect. 6.303").
[157] *Id.* at 4.
[158] Brief for Reconsideration, B-401472, at 7.
[159] Dep't of the Army-Reconsideration*,* B-401472.2 at 4.
[160] FAR 17.207(f)(1)-(5) provides examples of compliance to include a specific dollar amount, an amount to be determined by applying provisions (or a formula) provided in the basic contract, etc.

inconsistent with the principle that statutes and regulations be read and interpreted as a whole.[161] However, the Army argued that it conducted an "equivalent" evaluation.[162] GAO further interpreted the former requirement in a footnoted comment to require a price evaluation by "adding the total price for all options to the total price for the basic requirement" in compliance with FAR 52.217-5.[163] GAO ultimately denied the Army's request for reconsideration for failure to show the prior decision contained a material error of law or fact that warranted modification or reversal.[164]

Just as the Army tried to argue that the pricing of FAR 52.217-8 extensions are generally not evaluated as part of the initial competition,[165] in practice agencies generally did not establish methods for evaluating FAR 52.217-8 prices separately. In Vernon Edwards' article, Exercising Options: An Unanticipated Issue,[166] he acknowledged that most agencies do not establish separate line items for pricing FAR 52.217-8 extensions. In fact, most agencies had assumed that the rates referred to under the clause "within the limits and at the rates specified in the contract" referred to the rates in effect during the period in which the option was exercised.[167] Though GAO's finding that the Army failed to properly evaluate the FAR 52.217-8 extension,[168] GAO did not provide any guidance

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[161] Dep't of the Army-Reconsideration, B-401472.2 at 4.
[162] Brief for Reconsideration, B-401472, at 7.
[163] Dep't of the Army-Reconsideration, B-401472.2 at 4 n. 5.
[164] *Id.* at 3.
[165] Brief for Reconsideration, B-401472, at 11.
[166] Vernon J. Edwards, *Exercising Options: An Unanticipated Issue*, 24 No. 6 Nash & Cibinic Rep. ¶ 30 (June 2010).
[167] *Id.* at 1.
[168] Dep't of the Army-Reconsideration, B-401472.2 at 4 n. 5 (stating, "the FAR refers to the evaluation of options for award purposes as a price evaluation, effected by 'adding the total price for all options to the total price for the basic requirement,' *see* FAR sect. 52.217-5, a process that did not occur here").

as to what a proper evaluation process would entail. This could be because the FAR does not provide that level of specificity as previously discussed.

The lack of specificity may be the reason GAO chose to treat FAR 52.217-8 extensions and FAR 52.217-9 options the same. Just a few years after GAO's decision in *Major Contracting Services, Inc.,* the GAO rendered an opinion in a protest where the Army followed GAO's advice and evaluated the pricing of the FAR 52.217-8 clause. In *Serco Inc.* the Army awarded numerous indefinite delivery, indefinite quantity (ID/IQ) contracts[169] for human resource services.[170] The Army solicited for a task order to one of the companies holding an ID/IQ contract.[171] The solicitation required pricing for a 1-year base period, two 1-year option periods, and informed offerors that the government may choose to exercise the FAR 52.217-8 clause and will evaluate its option to extend services by adding 6 months of the offeror's final option period price to the offeror's total price.[172]

A protest ensued after the Army selected an award winner. The Army argued that the GAO lacked jurisdiction to hear the protest because the total evaluated price of the task order was below the $10,000,000 threshold.[173] The Army did not include the pricing

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[169] FAR 16.504 provides for Indefinite delivery/Indefinite quantity contracts (a.k.a. ID/IQ or minimum quantity contracts) which requires the government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. The provision also requires the contractor to furnish any additional quantities, not to exceed the stated maximum. This contract vehicle permits flexibility in both quantities and delivery schedules allowing the government to order supplies or services when needed. Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1386.
[170] Serco Inc., B-406061.1, B-406061.2 (Comp. Gen.), 2012 CPD ¶ 61 (Feb. 1, 2012).
[171] *Id.* at 1.
[172] *Id.* at 1 and 3.
[173] The Federal Acquisition Streamlining Act of 1994 generally precludes protests concerning task and delivery orders except for protests on the grounds that the order

of the FAR 52.217-8 clause in calculating the total evaluated price of the task order, but it did include the pricing of the two 1-year option periods under FAR 52.217-9. Accounting for the 52.217-8 price would have placed the total evaluated price of the task order above the threshold. The protestor argued that the total price should have included the pricing of the FAR 52.217-8 clause. GAO agreed, holding that the total evaluated price, to include the pricing of the FAR 52.217-8 clause, is the appropriate measure of the task order's value because it is the value that the Army considered for the purpose of its task order award determination.[174]

GAO further held that considering the pricing of the FAR 52.217-8 clause, even if the agency ultimately does not exercise the option, is the same as considering the pricing of FAR 52.217-9 options, which the agency may also choose not to exercise.[175]

These GAO cases show GAO's tendency to treat FAR 52.217-8 extensions the same as FAR 52-217-9 options. GAO made no distinctions between FAR 52.217-8 extensions and FAR 52.217-9 options in both its decision and reconsideration decision in *Major Contracting Services, Inc.* deciding all options needed to be evaluated as part of the initial competition[176] with the amount specified or reasonably determinable from the

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increases in scope, period, or maximum value of the contract under which the order is issued. The National Defense Authorization Act for fiscal year 2008 § 843 added an additional exception to the general protest prohibition and allowed GAO to decide protests of task and delivery orders exceeding $10,000,000. 10 U.S.C. § 2304c(e)(1) was also amended to allow for protests on task and delivery orders on "a protest of an order valued in excess of $10,000,000." Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1678.

[174] Serco Inc., B-406061.1 at 7.

[175] *Id.*

[176] Major Contracting Servs., Inc., B-400616 at 5.

terms of the basic contract.[177] Also, in *Serco Inc.* GAO pointed out that the pricing for FAR 52.217-8 extensions, just like the pricing for FAR 52.217-9 options, should be used in accounting for the task order's value for purposes of determining GAO's protest jurisdiction.[178] Such treatment is reasonable given the FAR's lack of specificity with regard to the clause's use and application.

On the other hand, a look into the courts and boards decisions on the application f FAR 52.217-8 extensions seem to go in a different direction. Though we will see none of the other forums hone in on the issue GAO raised in *Major Contracting Services, Inc.* they all seem to have accepted the federal government's practice of exercising FAR 52.217-8 extensions without specifically evaluating its price separately. In fact, the government's practice of relying on the same pricing from the previous base or option year—just as the Army argued was common—is the accepted method amongst the courts and boards. As stated before, though the GAO, boards and courts are not required to rely on each other's decisions, but it is clear that there is not a unified interpretation as to the meaning and purpose of the clause when looking at the different decisions.

C. 2009 COURT OF APPEALS FOR THE FEDERAL CIRCUIT'S DECISION IN ARKO EXECUTIVE SERVICES, INC.

The United States Court of Appeals for the Federal Circuit (CAFC) issued a decision earlier the same year GAO issued its decisions in *Major Contracting Services, Inc.*; yet, CAFC upheld the agency's use of the rate from a preceding option period as a

[177] Dep't of the Army—Reconsideration, B-401472.2 at 4.
[178] *See* Serco Inc., B-406061.1 at 7.

valid exercise of FAR 52.217-8.[179] In *Arko Executive Services, Inc. (Arko),* the government exercised all four 1-year options to renew under a contract with Arko for guard and security services at the American Embassy in Nicosia, Cypress. The fourth, and last, option was set to expire on March 31, 2005. Though the government began soliciting offerors for the successor contract in November 2004, the government informed Arko that it intended to unilaterally extend the contract period pursuant to FAR 52.217-8 in order to ensure time for the replacement contractor to be fully operational.[180]

Arko disputed the extension under the FAR 52.217-8 clause, citing to the FAR 52.237-3 clause, Continuity of Services [181] as the government's only authority to extend

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[179] *See* Arko Executive Services, Inc. v. U.S., 553 F.3d. 1375 (Jan. 21, 2009).
[180] *Id.* at 1377 (initially informing Arko the extension would be for one month, then later notifying Arko that the extension would have to be for two months).
[181] The clause states, in relevant part:

> (a) The Contractor recognizes that the services under this contract are vital to the Government and must be continued without interruption and that, upon contract expiration, a successor, either the Government or another contractor, may continue them. The Contractor agrees to—
>
> (1) Furnish phase-in training; and
>
> (2) Exercise its best efforts and cooperation to effect an orderly and efficient transition to a successor.
>
> (b) The Contractor shall, upon the Contracting Officer's written notice, (1) furnish phase-in, phase-out services for up to 90 days after this contract expires and (2) negotiate in good faith a plan with a successor to determine the nature and extent of phase-in, phase-out, services required. The plan shall specify a training program and a date for transferring responsibilities for each division of work described in the plan, and shall be subject to the Contracting Officer's approval. The Contractor shall provide sufficient experienced personnel during the phase-in, phase-out period to ensure that the services called for by this contract are maintained at the required level of proficiency.
>
> ….
>
> (d) The Contractor shall be reimbursed for all reasonable phase-in, phase-out costs (i.e., costs incurred within the agreed period after contract expiration that result from phase-in, phase-out operations) and a fee

services after all options have been exhausted. The government issued a final decision stating it intended to invoke FAR 52.217-8 and executed a modification to that effect. The modification specified that Arko would be paid for services "at the same rate it had been paid for services during the immediately preceding renewal period."[182]

COFC granted the government's motion for summary judgment finding there was no genuine issue of material fact as to whether the government properly exercised the FAR 52.217-8 clause and rejected Arko's claim that the extension fell under FAR 52.237-3, Continuity of Services.[183] Arko appealed to CAFC.

CAFC, in its decision, began by analyzing FAR 52.217-8 in relation to other provisions of the FAR. First, CAFC analyzed whether the exercise of FAR 52.217-8 after four option years, totaling five years of contract performance, conflicted with FAR 52.217-9. FAR 52.217-9 states, in relevant part, "the total duration of this contract, including the exercise of any options under this clause, shall not exceed five years." CAFC emphasized the plain language of the clause "including the exercise of any options under this clause" and held that the five-year limit only includes options exercised specifically under FAR 52.217-9.[184] CAFC held that options exercised outside this provision, i.e. options exercised under FAR 52.217-8, are not included in that five-year limit[185] and the limitations imposed by FAR 17.204(e)[186] only include the duration of the initial period of performance and renewal options under FAR 52.217-9.[187]

(profit) not to exceed a pro rata portion of the fee (profit) under this contract.

[182] Arko Executive Services, Inc., 553 F.3d. at 1377.
[183] *Id.* at 1378.
[184] *Id.* at 1380.
[185] *Id.*

CAFC interpreted the six months allowed under FAR 52.217-8 in this case to be *in addition* to the five years of performance exercised under the FAR 52.217-9. CAFC found that such use was consistent with the intent of FAR 52.217-8[188] and the requirement under FAR 17.208(f) to insert clauses "substantially the same as the clause at 52.217-8, Options to Extend Services."[189]

CAFC also addressed the use of FAR 52.237-3, Continuity of Services, and distinguished it from FAR 52.217-8. Though FAR 52.237-3 specifically provides for services "after this contract expires," CAFC found the lack of this additional verbiage in FAR 52.217-8 inconsequential.[190] CAFC noted that, unlike the provisions under FAR 52.217-8, FAR 52.237-3 requires slightly different services than those required under the contract to include phase-in, phase-out services and training with compensation at a different rate.[191]

CAFC found the requirement under FAR 52.217-8 for "rates specified in the contract" to include the rates applicable to the immediately preceding renewal period.[192] Arko previously argued that those rates expired when the option expired. Yet CAFC rejected that argument as again going against the intent of FAR 52.217-8, which is mainly to allow continuation of contract performance under the status quo when the

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[186] The FAR provision states, in relevant part, "unless otherwise approved in accordance with agency procedures, the total of the basic and option periods shall not exceed 5 years in the case of services…". *See also* discussion *supra* Part G.
[187] Arko Executive Services, Inc., 553 F.3d. at 1380.
[188] Stating FAR 52.217-8 allows the government to extend services without negotiating short extensions. *Id.* at 1380.
[189] *Id.*
[190] *Id.* at 1381.
[191] *Id.*
[192] *Id.*

award of a successor contract is delayed.[193] CAFC further held including specific rates for FAR 52.217-8 extensions would render the language under the clause "at the rates specified in the contract" superfluous.[194] CAFC affirmed COFC's summary judgment holding in favor of the government.

CAFC's ruling, nearly 11 months prior to GAO's reconsideration decision, viewed the government's use of rates from preceding options as a valid exercise of FAR 52.217-8. This would appear to be a premise that GAO would be at odds with, so long as the government failed to evaluate those rates as specifically FAR 52.217-8 rates in the initial competition.

D. 2012 COURT OF FEDERAL CLAIMS' DECISION IN OVERSEAS LEASE GROUP

Three years later COFC issued an opinion in *Overseas Lease Group, Inc.* (*Overseas*) in line with CAFC's decision in the Arko case.[195] *Overseas* dealt with an Army ID/IQ contract for the lease of vehicles in Afghanistan. Though the contract provided for a base year and four 1-year options, the Army did not exercise the fourth, and last, option.[196] Instead, the Army exercised the third option year, and just three months into the option period the Army issued short-term leases citing to its authority under FAR 52.217-8,[197] despite the contract requiring leases for 12-month periods.[198]

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[193] *Id.*
[194] *Id.*
[195] *See* Overseas Lease Group, Inc. v. U.S.*,* 106 Fed.Cl. 644 (Aug. 24, 2012).
[196] *Id*. at 646.
[197] Overseas claimed the government failed to indicate its reliance on FAR 52.217-8 at the time it issued the task orders, yet the government argued that the amendments used to effectuate the clause specifically cited to the authority under FAR 52.217-8. Defendant's Reply in Support of Partial Motion for Summary Judgment and Response to Plaintiff's Partial Motion for Summary Judgment, Overseas Lease Group, Inc. v. U.S., 106 Fed.Cl. 644 (Mar. 20, 2012) (No. 11-123C).

The Army asserted that such short-term extensions were permitted under the FAR 52.217-8 clause. Overseas argued that the clause was not applicable while the contract was still active[199] (i.e. they were in the middle of an option period and there was still another option to exercise) and that the parties agreed all leases issued under the contract must be for a minimum term of twelve months.[200] COFC agreed with Overseas and held that FAR 52.217-8 did not permit altering this contract term and the limits and rates specified in the contract would require leases be executed for twelve-month terms.[201]

Commentators appear to view COFC's decision in *Overseas* and CAFC's decision in *Arko* as limiting FAR 52.217-8 clause's use when the contract has additional standard options.[202] Yet those decisions did not specifically address *when* the appropriate time was to exercise FAR 52.217-8, but rather, under *what* circumstances they should be used. In *Arko* CAFC analyzed whether the government's use of FAR 52.217-8 conflicted with five-year limit imposed in the FAR 52.217-9 clause when all options had been exercised. The facts of the case show the government had began soliciting for a follow-on contract, and since Arko as the incumbent did not submit an offer, the government

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[198] Overseas Lease Group, Inc*.,* 106 Fed.Cl. at 650.
[199] *Id.* at 651.
[200] *Id.*
[201] *Id.*
[202] John R. Prairie & Tyler E. Robinson, *But Its Only Six Months: Recent Decisions Provide Conflicting Guidance About When Agencies Can Use FAR 52.217-8, Option to Extend Services, To Deal With Budget Uncertainty During Sequestration*, 48 SUM Procurement Law. 1 (2013) at 33 [hereinafter, Prairie & Robinson, But It's Only Six Months] (discussing COFC's holding in *Overseas*, relying on CAFC's decision in *Arko*, that where the government had exercised all renewal options a one-month extension to bridge the gap before the award of the successor contract was exactly the situation FAR 52.217-8 was intended to address).

was left with a delay in service.[203] The decision did not specifically address whether FAR 52.217-8 could be exercised before the options under FAR 52.217-9 had been exercised.

In these decisions, the courts did not address the evaluation of FAR 52.217-8 options for purposes of complying with FAR Part 6. Rather, they upheld the government's use of the rate from the preceding base/option period and analyzed any conflicts existing between FAR 52.217-8 and FAR 52.217-9. This is quite different than the approach taken by GAO in treating FAR 52.217-8 extensions and FAR 52.217-9 options as similar.

E. 2013 ARMED SERVICES BOARD OF CONTRACT APPEALS' DECISION IN APPEAL OF GLASGOW INVESTIGATIVE SOLUTIONS, INC.

Some commentators believe the Armed Services Board of Contract Appeals (ASBCA) has adopted an opposite interpretation from the courts with respect to *when* FAR 52.217-8 may be exercised.[204] Yet the ASBCA, in fact, acknowledged that neither of the decisions in *Overseas Lease Group, Inc.* and *Arko Executive Services, Inc.* held that the FAR 52.217-8 could only be used when all contract options have expired.[205]

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[203] Arko Executive Services, Inc., 553 F.3d at 1380.

[204] Prairie & Robinson, But It's Only Six Months, *supra* at 32 (interpreting COFC and CAFC's decisions in Overseas Lease Group, Inc. and Arko Executive Services, Inc. as limiting FAR 52.217-8 use when the contract has additional "standard" options remaining). *See also* John S. Vento, *Understanding Recent Changes In Government Contracts Law and Their Impacts On Contractors and Subcontractors*, Litigation Strategies for Government Contracts (Sep. 1, 2013) at 8 (opining that had the lease in Overseas Lease Group, Inc. been tried at the ASBCA, the government would have prevailed).

[205] Appeal of Glasgow Investigative Solutions, Inc., ASBCA 58111, 13-1 BCA ¶ 35,286, 5 (Apr. 9, 2013).

In fact it appears the ASBCA attempted to fill in the gap where *Overseas* and *Arko* left off. In *Appeal of Glasgow Investigative Solutions, Inc.* (*Glasgow*)[206] the ASBCA addressed whether the government was required to exhaust all options before exercising the FAR 52.217-8 clause. In this case for armed security guard services at the National Guard Armory in Washington, DC, Glasgow appealed a decision by the contracting officer to extend services under FAR 52.217-8. The original contract did not include the FAR 52.217-8 clause, though the clause was later incorporated into the contract via a bilateral contract modification.[207] The contract contained contract line item numbers (CLINS) for four separate option years.

Instead of exercising Option Year 2 upon completion of Option Year 1 period of performance, the contracting officer notified Glasgow that the government would be requesting only two months of additional performance.[208] The contracting officer then issued a modification extending Option Year 1 for two months as opposed to exercising Option Year 2. The government executed subsequent modifications further extending Option Year 1 for an additional four months.[209] After various inquiries by the appellant, the contracting officer cited to funding issues that prohibited the government from exercising the full option under Option Year 2.[210]

The government later argued before the ASBCA that it exercised the extensions specifically under FAR 52.217-8. Glasgow argued that the government improperly

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[206] *Id.*
[207] *Id.* at 2.
[208] Though the government sought Glasgow's approval for bilateral modifications, it is unclear whether the government initially conveyed to Glasgow the government's intent to rely on FAR 52.217-8.
[209] *Id.* at 3.
[210] *Id.*

extended performance under FAR 52.217-8 as it was designed to extend the contract term after all options have been exercised, and cannot be used to create month-to-month option periods. Glasgow further argued it was only appropriate to invoke FAR 52.217-8 when there is a follow-on contract and the government needs to bridge performance between the incumbent and the new contractor.[211]

As stated above, the ASBCA looked to COFC's and CAFC's decisions in *Overseas* and *Arko*, respectively, and found neither of those decisions held FAR 52.217-8 was to be used "only or exclusively when all contract options have expired and the government needs to extend the incumbent contractor's performance until a successor contract was awarded."[212] Instead, the ASBCA relied on one of its previous cases[213] finding that post-option extensions were not the only circumstances for use of the FAR 52.217-8 clause.[214]

In its previous case, *Griffin Services, Inc.*, the Board held that the option under FAR 52.217-8 could be exercised at any time during the period of contract performance as specified in the schedule then in effect.[215] After the government failed to provide timely notice of its intent to exercise the first option period under FAR 52.217-9,[216] the government unilaterally modified the contract under FAR 52.217-8. Despite the contract's schedule lacking any requirements as to number of days for advance notice, the

[211] *Id.* at 5.
[212] *Id.*
[213] *See* Appeal of Griffin Services, Inc., ASBCA 52280, 52281, 02-2 BCA ¶ 31,943 (Aug. 2, 2002).
[214] Appeal of Glasgow Investigative Solutions, Inc., ASBCA 58111 at 5.
[215] *Appeal of—Griffin Services, Inc.*, ASBCA 52280, 52281, 02-2 BCA ¶ 31,943 (Aug. 2, 2002).
[216] The Option to Extend The Term of the Contract (MAR 1989) clause required 60 days notice prior to contract expiration.

Board interpreted "within the period specified in the Schedule" to mean that the option may be exercised at any time during the period of contract performance specified in the Schedule then in effect—i.e. within the then period of contract performance.[217]

Though the ASBCA upheld the government's extensions as valid exercises of the FAR 52.217-8 clause in its former case of *Glasgow*, the ASBCA was silent with regards to the clause being added under a modification and not part of the original contract. It is unclear from this decision where the ASBCA stood on the issue that the GAO honed in on—mainly, whether the option to extend under FAR 52.217-8 was evaluated as part of the initial competition in accordance with FAR section 17.207(f).

The ASBCA has addressed other issues arising out of the government's exercise of FAR 52.217-8. In its earlier decision, *Appeal of American Contract Services, Inc. (American),*[218] the Board interpreted the government's inclusion of a notice requirement "within 15 days" in exercising the August 1989 version of FAR 52.217-8[219] to mean within 15 days of contract expiration, not within 15 days of contract award.[220] American argued that the notice requirement should have been interpreted to mean 15 days within contract award. Yet, the ASBCA rejected that argument and compared the notice requirement in FAR 52.217-8 to the notice requirement in the FAR 52.217-9 clause that required "notice of [sic] intent to extend at least 60 days before the contract expires..."

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[217] Griffin Services, Inc., ASBCA 52280, 52282 at 5.
[218] *See* Appeal of American Contract Services, Inc*.,* ASBCA 46788, 94-2 BCA ¶ 26,855 (Apr. 6, 1994), *aff'd on recons.,* 94-3 BCA ¶ 27,025 (Jun. 30, 1994).
[219] The 1989 version included as the last sentence, "The Contracting Officer may exercise the option by written notice to the Contractor within the period specified in the Schedule." Part II of the contract indicated that the clause was to be completed to read "within 15 days."
[220] Appeal of American Contract Services, Inc*.,* ASBCA 46788 at 3.

The Board also rejected American's argument that exercising the FAR 52.217-8 clause was unconscionable because it required American to render services at the same price as the basic contract.[221] The Board upheld the government's exercise of the option because the clause was included in the solicitation and American "presumably read and considered the impact that the government's exercise of this option would have on its pricing of the work and the profitability of the contract before it submitted its bid."[222]

In all of its decisions the ASBCA addresses the use of FAR 52.217-8 extensions in lieu of FAR 52.217-9 options and compares the two only with regard to the notice requirements when exercising them. Yet, what is evident is that the Board did not require the government to specifically evaluate FAR 52.217-8 extensions prior to award so long as the clause itself was included in the solicitation. In fact, neither did the courts. Is it that the courts and board completely missed the requirements for the proper exercise of FAR 52.217-8 extensions, or is the lack of specificity in the FAR with regard to the clause's application that resulted in such divergent decisions? I believe it is the latter and I agree that the legal community as a whole needs to reach a common understanding of the proper use of FAR 52.217-8 and its pricing.[223] Practitioners in the field have acknowledged that these inconsistencies, sometimes outright conflicts, will continue to be a point of contention between government agencies and contractors over the proper circumstances for use of the clause.[224]

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[221] *Id.*
[222] *Id.*
[223] Vernon J. Edwards, *Postscript: When the Government Can Choose Among Options*, 21 No. 11 Nash & Cibinic Rep. ¶ 57 (Nov. 2007).
[224] *See* Prairie & Robinson, But It's Only Six Months, *supra* at 32.

V. DOD RESPONSE

This next section will take a look at the problem DoD agencies faced in trying to comply with GAO's decision in *Major Contracting Services, Inc.* and the reconsideration decision. As the Army touched upon in its brief to GAO, no agency the Army was aware of routinely evaluated FAR 52.217-8 extensions as part of source selection.[225] This was true with regards to DoD agencies as explained below.

A. ARMY'S REQUEST TO OPEN A FAR CASE

Shortly after GAO's 2009 decisions in *Major Contracting Services, Inc.*, the Army requested that a FAR case be opened to address the issues raised by GAO.[226] The Army stated that the GAO decisions would have a "significant impact on the procurement process because it essentially renders null our ability to extend contracts for a short term in the manner previously practiced."[227] Believing it was not practical to comply with GAO's recommendation, the Army requested that a revision be made to FAR 17.207.[228]

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[225] Brief for Reconsideration, B-401472, at 11.
[226] *See* Army's Request for FAR Case, *supra* at 1.
[227] *Id.*
[228] The Memorandum states:

> However, it is not possible for the Government to comply with what GAO sees as a prerequisite for exercising an option under FAR 52.217-8 because it is not possible for the contracting officer to evaluate an option that does not yet have a known period of performance associated with it. At the time of initial completion, the contracting officer would not know whether, or for how long, or when, there may be a need for continuation of services. Furthermore, there is no separate pricing associated with the option under FAR 52.217-8, since that clause specifies that performance will be at the rates specified in the contract, only to be adjusted for revisions to prevailing labor rates. In fact, to refer to the extension of performance under FAR 52.217-8 as an "option" may be somewhat of a misnomer.

The Army's request touched on a major issue with regards to FAR 52.217-8 evaluations—it's not practical.[229] The FAR provides that options be evaluated by adding the total price for all options to the total price for the basic requirements.[230] Yet this method as approved by the GAO,[231] would not appear to work with FAR 52.217-8 extensions. This is mainly because FAR 52.217-8 extensions can be exercised numerous times, not to exceed six months; yet the period of performance is uncertain because the trigger for the clause's use is circumstances beyond the control of the contracting offices.[232] Part of the problem identified in the Army's Memorandum is that FAR 52.217-8 extensions do not contain separate prices.[233] The only requirement called for in the FAR with regards to pricing is "within the limits and at the rates specified in contract."[234]

The Army did raise the fact the only alternative to the evaluation of FAR 52.217-8 extensions is, as GAO identified—to justify the extension as a sole-source procurement.[235] Yet, having to do so would be contrary to the intent of the clause. If the purpose of FAR 52.217-8 is to protect contracting agencies from being "forced to

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Id.
[229] *Id.*
[230] FAR 52.217-5 (providing an exception when it is not in the government's best interest).
[231] *See* S.A.F.E. Export Corporation, B-204718 (Comp. Gen.) 82-1 CPD ¶ 62 (Jan. 27, 1982) (holding that the addition of the total price for all option years to the total price of the basic period was proper).
[232] *See* FAR 37.111.
[233] Army's Request for FAR Case, *supra* at 1.
[234] FAR 37.111 (also providing for adjustments only as a result of revisions to prevailing labor rates).
[235] Army's Request for FAR Case, *supra* at 1. *See also* Major Contracting Services, Inc., B-401472 at 7.

negotiate short extensions to existing contracts" while awaiting a follow-on contract,[236] what are agencies to do when they need to quickly cover a bridge period for a limited period of time?[237] FAR 52.217-8 was supposed to alleviate this very problem.[238]

Even if the extension may be justified as a sole-source procurement, another problem is presented. Generally the two exceptions to FAR Part 6's competition requirements most used by agencies are: only one responsible source and unusual and compelling urgency.[239] However, using the former justification is discounted by the very fact that the agency has a follow-on contract or is undergoing the source selection process.[240] So presumably there is more than one responsible source. Also, using the second justification of unusual and compelling urgency[241] is problematic because the standard is set very high.[242] Or at least higher than FAR 37.111's requirement that circumstances be beyond the control of contracting offices. So if the alternative to evaluating FAR 52.217-8 extensions is to justify the extension as a sole-source procurement, then what justification is appropriate?

In the Army's proposal to revise FAR 17.207, the agency sought to set apart FAR 52.217-8 extensions from the contracting officer's consideration.[243] Mainly, the suggestion was to eliminate the requirement that FAR 52.217-8 extensions be synopsized

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[236] *See* 54 Fed. Reg. 29278-01.
[237] Army's Request for FAR Case, *supra* at 2.
[238] *See* 54 Fed. Reg. 29278-01.
[239] 41 U.S.C. § 3304(a) and 10 U.S.C. § 2304(c). *See* discussion *supra* note 26.
[240] *See* FAR 6.302-1.
[241] *See* FAR 6.302-2.
[242] FAR 6.302-2 states "the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals."
[243] Army's Request for FAR Case, *supra* at 2.

under FAR Part 5[244] and, instead, include explanatory language stating FAR 52.217-8 extensions would satisfy FAR Part 6 full and open competition requirements so long as the clause was included in the solicitation and the base year and FAR 52.217-9 option prices (which FAR 52.217-8 extensions would be based on) are evaluated as part of the initial competition.[245] This would essentially eliminate the requirement that FAR 52.217-8 extensions be evaluated separately from FAR 52.217-9 options.

The Army's request prompted attempts to revise the FAR, and later the DFARS.[246] In the interim period, other DoD agencies waited for guidance and clarification. The agencies also faced the issue of having to set internal guidance for their

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[244] The suggested language was, in relevant part:

> 17.207—Exercise of Options
>
> (c) The contracting officer may exercise options only after determining that—
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> ….
>
> (4) The option [**other than FAR 52.217-8, Option to Extend Services,**] was synopsized in accordance with Part 5 unless exempted by 5.202(a)(11) or other appropriate exemptions in 5.202...

Id. at Tab A.

[245] The suggested language was, in relevant part:

> ....
>
> (f) Before exercising an option, the contracting officer shall make a written determination for the contract file that exercise is in accordance with the terms of the option, the requirements of this section, and Part6. [**An option to extend services pursuant to FAR 52.217-8 will satisfy the requirements of Part 6 regarding full and open competition, if the clause at FAR 52.217-8 is included in the solicitation, and the base year and option year prices, upon which the price of the extension period will be based, are evaluated as part of the initial competition.**] [**Otherwise, t**]o satisfy the requirements of Part 6 regarding full and open competition, the option must have been evaluated as part of the initial competition and be exercisable at an amount specified in or reasonably determinable from the terms of the basic contract…

Id. at Tab A.

[246] *See infra* Part VI.

procurement professionals to follow in the wake of GAO's decisions in *Major Contracting Services, Inc.*

B. NAVY

In February 2013 the Navy sent out a policy memorandum citing to GAO's decisions in *Major Contracting Services, Inc.* The memo provided a little more guidance as to how to comply with evaluation of the clause. It provided, in relevant part:

> Therefore, when using FAR Clause 52.217-8, activities are reminded to include in the pricing evaluation criteria, in the original competition, all option prices, including any periods anticipated to be covered by FAR Clause 52.217-8. The option is then exercisable at the amount specified in the contract. When evaluating as part of the initial competition, activities shall also consider the total time limitation on base and option periods in accordance with FAR 17.204 and NMCARS[247] 5217.204.[248]

Despite the memo not specifying how to conduct pricing evaluations, it did specifically call for pricing evaluation criteria for FAR 52.217-8 extensions.

C. AIR FORCE

The Air Force sent out internal guidance in August 2013 regarding use of the FAR 52.217-8 clause.[249] Citing to the 2009 GAO decisions, the Air Force reminded its

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[247] NMCARS is the Navy Marine Corps Acquisition Regulation Supplement.
[248] Memorandum from the Office of the Assistant Secretary of the Navy, Research, Development, and Acquisition, for Distribution (Feb. 26, 2013) (copy on file with author).
[249] *See* Memorandum from the Office of the Assistant Secretary of the Air Force, Acquisition, to ALMAJCOM/DRU/FOA (Aug. 20, 2013) (copy on file with author).

contracting community that FAR 52.217-8 extension prices must be evaluated during the initial contract award process otherwise the contracting officer will be required to submit a J&A[250] in order to exercise the extension.[251] The guidance further provided that the pricing evaluation criteria needed to be included in solicitations and the option prices must be included in the total evaluated price of a proposal.[252]

Despite the guidance, the Air Force legal community was still unsure how a proper evaluation could play out given the uncertainty of when the extension would be exercised. One question raised included whether the contracting officer would have to solicit and evaluate separate prices from offerors for a FAR 52.217-8 extension at the end of the base year, and at the end of each separate option year, including the last option year—making the whole process impractical.[253] Another question addressed whether a contracting officer could solicit and evaluate the price of a FAR 52.217-8 extension priced out at the very end of a contract, i.e. based on the contractor's rates for the final options year—acknowledging that this method would require the agency to pay the

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[250] FAR 6.303 requires the contracting officer to document and sufficiently justify the use of an exception to the full and open competition requirement of FAR Part 6. This document is commonly referred to as the Justification and Approval (J&A). Cont. & Fiscal L. Dep't, The Judge Advoc. Gen.'s Legal Center & Sch., U.S. Army, 165th Contract Attorneys Course Deskbook, 2-8 (Jul. 2012).
[251] The Army previously identified this alternative method, though the Army concluded this was not a viable option. *See* Memorandum from the Office of the Assistant Secretary of the Air Force, Acquisition, to ALMAJCOM/DRU/FOA (Aug. 20, 2013) (copy on file with author).
[252] *Id.*
[253] Email from Enterprise Sourcing Branch, Air Force Legal Operations Agency (Sep. 4, 2013) (copy on file with author).

highest rate if the extension was exercised earlier instead of any remaining option periods.[254]

D. OTHER DOD AGENCIES

Civilian agencies sent out similar reminders to their acquisition personnel regarding evaluation of extensions. Yet the reminders did not address the specific issues surrounding evaluation of FAR 52.217-8 options. For example, the Defense Logistics Agency (DLA) attorneys reminded its acquisition workforce that evaluating the extension was a "critical legal requirement."[255] The guidance was unclear as far as how to ensure compliance with GAO's 2009 decisions. DLA's Defense Logistics Acquisition Directive (DLAD) sets out guidance on the evaluation of and exercise of options,[256] but does not specifically address FAR 52.217-8 extensions.[257]

The response from the DoD community indicates a general lack of clarity as to how to achieve compliance with GAO's 2009 decisions. Since GAO's decisions

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[254] *Id.*

[255] Email from Kerry Pilz, DAR Council DLA Policy, to Bertha Diaz (Mar. 10, 2014) (on file with author).

[256] DLAD 17.206-90 provides:

> (b) The determination and approval not to evaluate an option estimated to exceed $550,000 prior to contract award (or definitization, if an undefinitized contract) shall be in the contract file, and shall include (see also 15.403-4(b)) either,
> (1) An explanation of the specific exemption that can be applied to avoid the data submission and certification requirements of Public Law (P.L.) 87-653, and identification of the pricing technique(s) available to subsequently determine the option price fair and reasonable without submission of certified cost or pricing data or catalog exemption data; or
> (2) A statement that such option price(s) are identified in the solicitation and contract Schedule as "not to exceed" ceiling price(s) subject to later definitization (see 17.208(a)(90)).

Defense Logistics Acquisition Directive (DLAD), Revision 5 (Apr. 2014).

[257] *Id.*

themselves contain no guidance on how to properly evaluate FAR 52.217-8 extensions and the courts and ASBCA are silent in this respect, it is easy to see why this is so. As stated previously, the Army's request to open up a FAR case sparked revision efforts to both the FAR and DFARS; but as we will see in the next section, those efforts have yet to be consummated.

VI. FAR AND DFARS REVISION EFFORTS

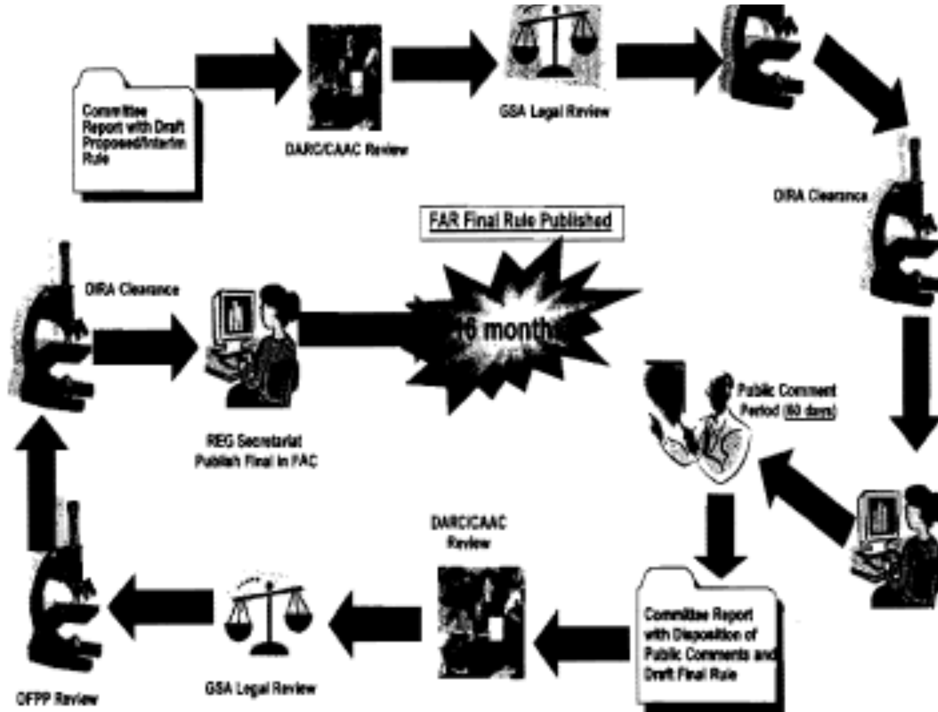
Earlier this paper explored some of the background of the FAR 52.217-8 clause and associated FAR 17.208 and FAR 37.111 clauses. Some of the comments concerning the addition of 37.111 to the FAR addressed the ambiguity in the language "within the limits and at the rates specified in the contract."[258] Since the language was never revised and has remained unchanged in over 20 years, the issues resurfaced after GAO's 2009 decisions. The Army's proposal to revise FAR 17.207 in order to address the issue regarding evaluation of FAR 52.217-8 extensions[259] served as a catalyst in efforts to revise the FAR.

[258] *See supra* notes 115-116 and accompanying text.
[259] *See supra* Part A.

A. *FAR REVISION EFFORTS*

41 U.S.C. §1707 governs the publication of the FAR and the process in which a final rule is published is indicated in the diagram below.[260] The standard timeline for a new FAR Case is roughly sixteen months.[261]

Figure 1 FAR Case Process Flow Chart



The Federal Acquisition Regulatory Council, established by authority of 41 U.S.C. § 1302, provides the overall direction to the Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DARC).[262] The CAAC and

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[260] FAR Operating Guide, Version 5-5C (2011) at 4, *available at* http://www.acq.osd.mil/dpap/dars/docs/FAR_Operating_Guide_Version_5-5C_20111115.pdf. (last modified Nov. 15, 2011).
[261] *Id.*
[262] *Id.* at 7. The FAR Council is chaired by the Administrator for Federal Procurement Policy and includes the Director, Defense Procurement and Acquisition Policy (DPAP), DoD, the Deputy Associate Administrator & Senior Procurement Executive, GSA, and

DARC independently deliberate on all changes to the FAR and reach an agreement on all proposed changes to the FAR,[263] as well as agreeing on all collateral requirements, such as the Federal Register notice.[264] In response to the Army's request to change the FAR requirements for use of the FAR 52.217-8 clause, the FAR Council opened up FAR Case 2010-003 on January 20, 2010.[265]

The FAR Acquisition Strategy Team (AST) presented its recommendations to the DARC and CAAC[266] on May 25, 2010.[267] The DARC then suggested a modification to the FAR requirements and provided the revised case to the CAAC.[268] Ultimately the CAAC did not agree with the DARC recommended changes.[269] On September 22, 2010 the CAAC provided the DARC Chair with a decision memorandum recommending the

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the Assistant Administrator for Procurement, National Aeronautics and Space Administration. *Id.*

[263] The FAR Secretariat also provides administrative support to the DARC and CAAC. Tomanelli, *supra* at ix.

[264] *Id.* Changes to the FAR are accomplished by issuance of either a proposed rule or an interim rule allowing for public comment from interested parties. Notices of proposed and interim rules are published in the Federal Register in both paper form and electronically. Steven N. Tomanelli, *supra* at xi (footnoting http://www.gpo.gov/fdsys).

[265] *See* Memorandum from DARS Staff Analyst, to Director, Defense Acquisition Regulations Council (Oct. 13, 2010) (copy on file with author).

[266] FOIA submissions 263807 and 263808 were sent by the author to GSA on January 24, 2014 in attempt to get the internal documents relating to FAR Case 2010-003. On May 23, 2014 GSA responded with a limited release of information citing to statutory exemptions under 5 U.S.C. § 552(b)(5) and 5 U.S.C. § 552(b)(6). The recommendations made by the AST were not included in the release of information.

[267] Memorandum from DARS Staff Analyst, to Director, Defense Acquisition Regulations Council (Oct. 13, 2010) (copy on file with author).

[268] Memorandum from DARS Staff Analyst, to Director, Defense Acquisition Regulations Council, *supra.*

[269] Though the exact recommendations made by the DARC and the reason for the CAAC's rejection have not been disclosed, *see supra* note 266, the recommendations made by the DARC were later incorporated into DFARS Case 2011-D003.

FAR case be closed without action and suggested the DARC's proposed changes were better suited in the DFARS.[270]

Efforts to revise the FAR were quickly ended eight months after the FAR case was opened. Though the standard timeline for the complete process is generally 16 months,[271] the FAR case only made it to the second stage[272] before disagreements on how to appropriately address GAO's concerns ensued. The only option left to address the Army's concerns was to revise the DFARS.

B. DOD REVISION EFFORTS

After the CAAC rejected the DARC's proposed rule in FAR Case 2010-003, the DARC proposed to amend the DFARS and provide an alternative to the FAR 52.217-8 clause.[273] DFARS Case 2011-D003 sought to amend subpart 217.2, Options, which would prohibit the use of the FAR 52.217-8 clause and use DFARS 252.217-700X, Extension of Services, instead for use within the DoD.[274]

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[270] *See* E-mail from Director, GSA Acquisition Policy Division, *supra* at attachment.
[271] FAR Operating Guide, *supra* at 6.
[272] *See* Figure 1, FAR Case Process Flow Chart, *supra* at 53.
[273] *See* Draft Federal Register Notice and Draft DFARS Text, dated June 8, 2010 (copy on file with author). The DARC provides recommendations to the DoD for publication of proposed, interim, and final rules to amend the DFARS. Defense Federal Acquisition Regulation Supplement Operating Guide, at 3, *available at* http://www.acq.osd.mil/dpap/dars/docs/DFARS_Operating_Guide--June_17_2011.pdf (last modified June 2011).
[274] *See* Draft Federal Register Notice and Draft DFARS Text, *supra*. Agency FAR Supplements are generally intended to provide direction and guidance as to how statutory and regulatory requirements contained in the FAR are implemented within the particular agency. The FAR Supplements must not unnecessarily repeat, paraphrase, or otherwise restate material contained in the FAR or higher-level agency acquisition regulations and cannot conflict or be inconsistent with the FAR (except as required by law or as provided in an authorized FAR deviation under FAR Subpart 14). Steven N. Tomanelli, *supra* at ix-x.

The proposal (and the updates to the proposal) included an entirely new section under DFARS 217.2.[275] The proposed DFARS 217-206 read:

> (c) Although at the time of contract award there will not be an immediate or foreseeable intent to exercise the option at DFARS 252.217-700X, Extension of Services, the contracting officer shall evaluate the maximum potential cost to the Government of such option. For evaluation purposes, the maximum potential cost to the Government will be the cost of acquiring the extended services under the contract for a six-month period at the prices or rates offered for the last period of performance under the contract.[276]

The Draft Federal Register Notice included an explanation stating that a number of GAO cases cited to improper use of the FAR clause, thus necessitating an alternative solution for DoD contracting officers.[277] In order to accomplish this, this newly created section needed to provide clarification, or rather additions to, the existing requirements under FAR subpart 17.2.[278]

Unlike FAR 52.217-8, Option to Extend Services, the proposed DFARS 252.217-700X, Extension of Services, would not allow for tailoring of the clause and would provide limitations on its use and requirements to ensure the clause was appropriately

[275] Draft Federal Register Notice and Draft DFARS Text, *supra*.
[276] *Id.*
[277] *Id.*
[278] *Id.*

priced and used.[279] DFARS Case 2011-D003 also sought to add another section under DFARS 252.217-207 that read:

> (a)(1) Do not exercise an option under the authority of the clause at 252.217-700X, Option to Extend Services, except in exigent circumstances beyond the control of the contracting officer. The contracting officer's written determination to exercise this option shall be approved at a level above the contracting officer and included in the contract file.
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> (2) The contracting officer may exercise the option at DFARS 252.217-700X, Extension of Services, at the end of the basic period or any option period. The contracting officer may exercise the option more than once, but the total extension of performance under the clause shall not exceed six months. If the option is exercised after the total contract period (basic period plus options periods) has reached five years, then the resulting option period will be an exception to the first five-year limitation on services contracts at FAR 17.204(e), unless statutory restrictions apply.
>
> (3) Upon exercising the option, the contracting officer shall establish the option price, on a unilateral basis, by applying the prices or rates in effect under the contract at the time the option is exercised to those services that have been extended. The option price (or option prices if the option is exercised more than once) shall be no greater than the evaluated not-to-exceed amount (maximum potential cost to the Government) set

[279] *Id.*

forth in the clause plus any adjustment required as a result of revisions to prevailing labor rates provided by the Secretary of Labor.[280]

Furthermore, the proposal added a new paragraph under DFARS 217.208, Solicitation Provisions and Contract Clauses, providing:

> (f) Insert the clause at 252.217-700X, Extension of Services, in lieu of the FAR clause at 52.217-8, Option to Extend Services, in solicitations and contacts for services when the Government may require the contractor to continue performance of contract services for one or more periods, not to exceed a total of six months, and the option period is identified as a separately priced line item.[281]

Finally, the proposal created the new DFARS 252.217-700X, Extension of Services Clause, to replace FAR 52.217-8, Option to Extend Services. The clause was to read as follows:

252.217-700X Extension of Services.

As prescribed in 217.208(f), insert the following clause:

EXTENSION OF SERVICES (DATE)

> (a) The Government may require continued performance of any services, within the limits specified in the contract, at the end of any period of performance under the contract. This option may be exercised more than once, but the total extension of performance hereunder shall not exceed six months.

[280] *Id*.
[281] *Id*.

> (b) The Contracting Officer may exercise the option by written notice to the Contractor within ______ [*insert the period of time within which the Contracting Officer may exercise the option]*. The option price will be established by applying the prices or rates in effect under the contract at the time the option is exercised to those services that will be extended. The total option price for the one or more extensions shall not exceed $________ [insert the evaluated not-to-exceed amount] plus any adjustment required as a result of revisions to prevailing labor rates provided by the Secretary of Labor.[282]

The proposed Federal Register Notice called for comments to the proposed rule(s) to be submitted and considered in forming the final rule.[283] A year later, there was a revision to the Draft Federal Register Notice that included the requirement of "exigent circumstances" in exercising the clause.[284] Such language sought to limit use of the clause only in those circumstances involving bid protests and alleged mistakes in offers.[285] Ultimately, the DoD community expressed concern that the language was too

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282 *Id.*
283 *Id.*
284 The change included a new section under DFARS 252.217.207, Exercise of Options, that read:

> (a)(1) Do not exercise an option under the authority of the clause at 252.217-70XX, Option to Extend Services, except in exigent circumstances beyond the control of the contracting office. [The only allowable exigent circumstances are extensions due to protests against award or proposed award and alleged mistakes in offers.] The contracting officer's written determination to exercise this option shall be approved at a level above the contracting officer and included in the contract file.

Draft Federal Register Notice and Proposed DFARS Rule, dated June 29, 2011 (copy on file with author).
285 *Id.*

restrictive and the proposed rule was returned because it was not ready for publication and needed additional clarification.[286] DFARS case 2011-D003 was closed[287] on September 14, 2011 without any further action and without any final rules being published.[288]

VII. ANALYSIS ON THE CURRENT PROBLEMS SURROUNDING FAR 52.217-8

The failed attempts at revisions to the FAR and DFARS have placed the contracting community, particularly the DoD contracting community, back in the same position as it was just after GAO's 2009 decisions. As the first section will address, the current use and application of FAR 52.217-8 have highlighted the inefficiencies surrounding the clause. In order to fix these issues, a revision to the FAR is necessary that focuses on the heart of the problem, yet avoids the pitfalls that existed with regards to the FAR and DFARS revision efforts. The latter sections will analyze the three major problems that have arisen in connection with FAR 52.217-8. Whether identified at the clause's inception or not until recently, these problems are use of the clause in order to circumvent competition, imposing terms not agreed to by the contractor at the time of contract formation, and lack of clarity as to when and how the clause may be applied. If the contracting community is going to move forward and avoid the issues that prevented

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[286] Memorandum from DARS Staff Analyst (Jun. 29, 2011) (copy on file with author) (stating "the proposed rule required additional clarification to address potential areas of risk within the DFARS text and associated clause that could be misinterpreted by contracting officer[s] and the acquisition community").

[287] Cases are closed either when the final DFARS rule is published in the Federal Register or may be closed without publication only by approval of the DARC Director (after appropriate consultation with the DARC). DFARS Operating Guide, *supra* at 9.

[288] DFARS Cases Closed/Final Rule Published As of 12/12/2012; *available at* http://www.acq.osd.mil/dpap/dars/closedcases/archive/DFARS_FY_2011.pdf.

previous revision attempts to the FAR and DFARS, then the only practical solution is to eliminate the ambiguity surrounding the FAR 52.217-8 clause. Specifically, clarifying language needs to focus on the current phrase "at the rates specified in the contract" and nothing more.

A. MOVING AWAY FROM EFFICIENCY?

A part of the U.S. acquisition reform movement in the 1990s was to achieve efficiency.[289] As discussed in Part I of this paper, the Clinger-Cohen Act of 1996 § 4101 added new provisions to the U.S. code to ensure that full and open competition in the FAR be implemented in a manner consistent with the need to efficiently fulfill the Government's requirements.[290] Yet as we have seen in the application of the FAR 52.217-8 clause, not only was the clause (and associated clauses) written with the intent to lessen the burden on contracting officers in fulfilling CICA's requirement for full and open competition,[291] but in its current application, the use of FAR 52.217-8 has actually shown to be inefficient in fulfilling the governments needs.[292]

The intent of FAR 52.217-8 was to address a void within the FAR that the other option clauses could not address. This was mainly to give contracting officers a remedy where situations beyond their control prevented timely award of recurring and continuing

[289] Schooner, *supra* at 8 (citing to Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. Univ. L. Rev. 3 (2001)).
[290] Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 295.
[291] *See* discussion *supra* Part III (intent of the clause was to allow contracting officers a short term remedy in extending existing services when there is a delay in the award of a follow-on contract).
[292] *See* discussion *supra* Part A (Army's argument that GAO's decisions have essentially rendered the ability to extend contracts in the short term null).

services contracts.[293] Otherwise, contracting officers would be forced to negotiate short extensions,[294] in effect tying up resources when focus should be on procuring a follow-on contract.

Compliance with GAO's decisions would require that the efficiency FAR 52.217-8 was meant to achieve in circumstances beyond the control of contracting offices be counteracted by the burdensome evaluation of a clause with unknown duration and unknown pricing criteria. In order to comply with the GAO's decisions, contracting officers will have to conduct evaluations on FAR 52.217-8 extensions, just as they would FAR 52.217-9 options. Doing so would entail evaluating pricing schemes for every possible scenario-prices for extensions exercised after the base year in addition to prices exercised after all options years. Furthermore, the contracting officer would have to evaluate those prices for a myriad of different durations—one week up to 6 months.[295] Even if the contracting officer could conduct a proper evaluation with so many variables, it is doubtful that evaluation of the FAR 52.217-8 extension would be any less of a burden on the contracting officer than negotiating short extensions in existing service contracts when circumstances arise (if they arise at all).

Opponents may argue that the use, in general, have led to more inefficiencies in the procurement process.[296] In the revision efforts to the DFARS, the proposal to strictly

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[293] 53 Fed. Reg. 3814-01.
[294] *Id.*
[295] The proposed DFARS clause attempted to alleviate this problem, yet the clause was never incorporated into the regulation. *See supra* note *275* and accompanying text.
[296] *See* Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1411 (stating that a disadvantage to the use of options is that they allow agencies to avoid taking steps to conduct procurements in an efficient manner).

limit "allowable exigent circumstances" to those situations involving bid protests and alleged mistakes in offers seem to reflect a concern that contracting officers would not use appropriate discretion in exercising the clause.[297] Yet the DoD community rejected these limitations.[298] Arguably this is because such limitations would themselves result in inefficient processes.

Though some may believe that limiting option use may motivate agencies to search from more efficient procedures,[299] these limitations have not been fleshed out with regards to the FAR 52.217-8 clause and may be more problematic.[300] Even if the issues surrounding the use and application of FAR 52.217-8 have highlighted the inefficiencies in the clause, there are those who believe efficiency is not the purpose of our federal procurement system. Critics suggest that efficiency was never a fundamental goal of the procurement process and our system is not designed to support it.[301] If this is true, then the current shrinking pool of procurement professionals will demand that efficiency quickly become a top priority.[302]

B. IMPROPER USE OF FAR 52.217-8

As mentioned earlier in this paper, one of the problems identified with use of any option is the concern that they allow government agencies to avoid taking the necessary

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297 *See supra* note 284 and accompanying text.
298 *See supra* note 286 and accompanying text.
299 Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1411.
300 *See* discussion *infra* Part VII.D.
301 Schooner, *supra* at 8 (citing to 15 U.S.C. § 644(e)(2)(C) where Congress stated that reduction of administrative or personnel costs alone shall not be a justification for bundling contract requirements).
302 *Id.* at 10 (commenting that the present political climate reflects an obsession with reducing the size of the federal workforce).

steps in the procurement process that allow for efficient procurements.[303] It still remains unclear what exactly those steps entail, but it appears that the underlying concern is that options may allow government agencies to circumvent competition. If an agency has the choice of exercising an option that has already been evaluated, then why would it go through the extra time and trouble of re-procuring goods or services on an annual basis? Obviously the reason would be to ensure the government is getting the best value since it is hard to determine competitive market prices years in advance, but it is unclear if the possibility of obtaining a better value outweighs the time and effort it would take to re-compete a requirement that already has evaluated options available. The only fora with jurisdiction to address these issues, since they are contract formation issues, are GAO, COFC and CAFC.

GAO found that the Army's use of the FAR 52.217-8 clause in *Major Contracting Services, Inc.* was improper because the clause was not evaluated as part of the initial competition, thus resulting in a new procurement that failed to meet competition requirements under FAR Subpart 6.3.[304] GAO's reconsideration decision honed in on the fact that the Army's failure to specifically conduct a price evaluation for the extension rendered use of the clause improper despite the fact the same rates from the previous base year applied and had themselves been evaluated as part of the initial competition.[305] Could this be part of the necessary steps needed for an efficient procurement process? If so then why didn't COFC or CAFC discuss this as a specific requirement when they upheld the agency's use of the rates from a preceding option

[303] *See supra* note 64 and accompanying text.
[304] *See supra* notes 146-147 and accompanying text.
[305] *See supra* note 163 and accompanying text.

period as valid exercises of FAR 52.217-8 in *Arko Executive Services*?[306] Instead of trying to reconcile these decisions, efforts would be better spent in revising the language of FAR 52.217-8.[307]

C. *IMPOSING TERMS NOT AGREED TO AT INITIAL COMPETITION*

Another problem identified with the use of the FAR 52.217-8 clause is that agencies could impose prices or terms that were not agreed to in the contract. There were concerns at the clause's inception that the FAR did not provide any guidance as to the pricing[308] and that the government's unilateral right to exercise the clause was too government friendly.[309] The result could be the government imposing terms upon the contractor that it could not have understood at the initial competition—at least not with any clarity. The boards of contract appeals, COFC and CAFC have jurisdiction over this contract administration issue. Yet, the only time this issue appears to have been raised amongst them is in regards to use of the same rates from a previous option period that the contractor argued had expired. As CAFC held in *Arko*, an option year's rates do not expire once the option expires when applying FAR 52.217-8.[310]

The imposition of terms that were not agreed to as part of the initial competition does not appear to be a current problem with FAR 52.217-8. Despite the comments submitted over 20 years ago, the current wording of the clause has not brought about significant issues in this respect. As this thesis will discuss in the next section, adding

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[306] *See supra* note 179 and accompanying text.
[307] *See* discussion *infra* Part VII.C.
[308] *See supra* note 69 and accompanying text (addressing the lack of guidance under FAR 37.111 for pricing extensions).
[309] *See supra* notes 106-107 and accompanying text.
[310] *See supra* notes 192-193 and accompanying text.

clarifying language to the clause will alleviate the concern about option pricing that CAFC previously dealt with in *Arko*.

D. LACK OF CLARITY AS TO THE APPLICATION OF FAR 52.217-8

Finally, the lack of clarity surrounding the application of FAR 52.217-8 has been a continuing issue with regards to the application of the clause. It may very well be the reason why there is concern that the clause is being used too often.[311] There appear to be two major issues: first, the FAR is not clear as to when the clause can be properly invoked; and second, it is even less clear has to how the clause may be properly invoked. As such the next logical step would be to correct the ambiguity that currently exists in the FAR.

First, the wording of FAR 37.111 lacks any limitations on contracting officers in determining what circumstances constitute "beyond the control of the contracting offices." The clause gives examples of such circumstances (i.e. bid protests and alleged mistakes in bid), but there are no express limitations on that determination. FAR subpart 17.2 and FAR 52.217-8 are also silent in this respect. The only comment submitted with regard to this particular wording in the drafting of FAR 37.111 was that the clause was too government friendly since it gave contracting officer's the unilateral right to extend.[312] Yet not one concern was expressed with regards to the contracting officer's determination on circumstances "beyond the control of the contracting offices." It would appear that the intent of the clause was to lend considerable discretion to contracting officers in deciding whether use of a FAR 52.217-8 extension was appropriate.

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[311] *See supra* notes 67-69 and accompanying text.
[312] *See* Letter from Professional Services Management Association to FAR Secretariat, *supra.*

Yet the case law does not address this issue. GAO's decisions in *Major Contracting Services* focused on the Army's failure to evaluate the FAR 52.217-8 extension, but did not address when the clause could be invoked or any limitations on contracting officers' decisions to invoke.[313] The courts and ASBCA decisions set forth above also do no address the issue.

Clarifying the wording in FAR 37.111 and FAR 52.217-8 as to when the clause may be invoked may help to alleviate the concern that the clause is being used too frequently. If the perception is that contracting officers are using the clause for reasons other than "circumstances beyond the control of the contracting offices"[314] then it would be a logical step to clarify exactly when contracting offices may invoke the clause. Yet this was the very issue that caused a stalemate in DFARS revision efforts.[315] In order to move forward and avoid those attempts that proved to be unsuccessful in the past, then focus needs to be placed on eliminating the ambiguity of the clause that was the heart of the struggle in *Major Contracting Services, Inc.*—in particular, evaluation of the clause.

The second issue with the language of the clause is clarity on how to conduct a proper evaluation. It is not surprising that over 20 years ago at the FAR 52.217-8 clause's inception, there was concern that language of both FAR 37.111 and FAR 52.217-8 contained ambiguous language.[316] The wording "within the limits and rates specified in the contract" has not been clarified and still exists in both FAR 37.111 and FAR 52.217-8. This is the very language the Army honed in on as problematic in

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[313] Note that this would ultimately be a contract administration issue and outside the GAO's jurisdiction.
[314] *See supra* notes 134-135 and accompanying text.
[315] *See* discussion *supra* Part VI.B.
[316] *See supra* notes 116-117 and accompanying text.

complying with GAO's 2009 decisions requiring extensions be evaluated as part of the initial competition.[317] But again, neither the GAO, courts, nor ASBCA have addressed this ambiguity or how to get around it.

DARC's proposal sought to specify that the rates or prices to be applied were those in effect under the contract at the time the extension was exercised and no greater than the "not to exceed amount" to be negotiated by the contracting officer.[318] Yet that effort never materialized since an agreement could not be reached in the DFARS revision efforts. If the contracting community wishes to move forward with complying with GAO's 2009 decisions, efforts will be better spent on clarifying the language "at the rates specified in the contract" contained in both FAR 37.111 and FAR 52.217-8.

There are two potential revisions. First, the addition of a simple clarifying phrase "***at prices then current at the time the clause is exercised***" to the language "The Government may require continued performance of any services within the limits and at the rates specified in the contract." This allows for the rates specified in the contract to be adhered to at a price that was already evaluated as part of the initial competition (i.e. the "then current" price). Not only would this comply with FAR 17.207(f) which requires the amount to be reasonably determinable from the terms of the basic contract either as a specific dollar amount or an amount determined by applying a formula, but this would allow contracting officers to determine with certainty that the price upon which the option is based and the terms thereunder were evaluated in accordance with

[317] *See* Brief for Reconsideration, B-401472, at 7. *See also* Army's Request for FAR Case, *supra* at 1.
[318] *See supra* note 280 and accompanying text.

FAR Part 6 competition requirements. This would also diminish the possibility that agencies would avoid taking the necessary steps to conduct efficient procurements.

A second potential revision is to clarify whether the language suggests either: 1) the rates which applied immediately prior to the extension will continue to apply throughout the extension, or 2) that the bid and contract will specify the rates agreed to by the parties in the event the extension is used.[319] Either way, making this clarification will place contracting offices and officers in a better position to evaluate FAR 52.217-8 extensions because they know what they are supposed to evaluate. Focusing on this single revision avoids imposing any additional limitations as to when contracting officers can invoke FAR 52.217-8.

A revision to the FAR, and not DFARS, is necessary in order to promote uniformity since uniformity is necessary for an efficient procurement system.[320] Had the DFARS revision efforts been accomplished, DoD contracting officers would have been required to use the DFARS extension clause in lieu of FAR 52.217-8.[321] Doing so would have strayed from the practice of the rest of the government and would have confused contractors who deal with agencies outside the DoD.

E. EFFECT ON CONTRACTING OFFICERS' DISCRETION

The current ambiguity surrounding FAR 52.217-8 may also have the effect of creating an atmosphere in which contracting officers are afraid to exercise their discretion. The FAR and DFARS revision efforts included attempts to impose more

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[319] *See* Letter from Data General to the FAR Secretariat, *supra.*

[320] Schooner, *supra* at 14.

[321] *See supra* note 280 and accompanying text (directing agencies to insert DFARS clause 252.217-700X in lieu of the FAR 52.217-8 clause).

limitations (as opposed to clarifying the existing language) as to when and how contracting officers may exercise FAR 52.217-8 extensions. If these attempts are a reflection of any criticism that may or may not exist in the contracting profession, then the result could lead to contracting officers exercising less and less discretion in the procurement process for fear of being second-guessed.

In the past there were efforts to restrict the use of options. As discussed earlier in this paper, GAO had made an effort in 1962 to limit the use of options.[322] However, efforts at streamlining acquisitions in the 1990s resulted in more frequent use of options in government procurement.[323] Additionally, the intent of FAR 37.111 was to lend considerable discretion to contracting officers in deciding whether use of a FAR 52.217-8 extensions. Yet, if the efforts to revise the FAR and DFARS sought to impose limitations on when extensions may be used, what message does this send?

Options have reduced the workload of acquisition personnel.[324] And as discussed previously, opponents of the use of options (in particular FAR 52.217-8) believe contracting officers would not use appropriate discretion in exercising them and continue to use options in lieu of advanced planning.[325] In the revision efforts to the DFARS, there were efforts seeking to restrict the circumstances in which the FAR 52.217-8 clause could be exercised to only those involving protests and alleged mistakes in bid.[326]

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[322] *See supra* note 41 and accompanying text.
[323] *Id.*
[324] Cibinic, Nash & Yukins, Formation of Government Contracts, *supra* at 1410.
[325] *See* discussion *supra* Part VII.B.
[326] Whereas the current text of FAR 37.111 only provides bid protests and mistakes in bid as examples in which the clause may be exercised.

Revision efforts even sought to raise the approval level for use of FAR 52.217-8 clauses to a level above the contracting officer.[327]

Revision efforts to the FAR and DFARS failed early in their respective processes, but is it possible that similar efforts in imposing limitations on contracting officers have created an atmosphere where contracting officers are afraid to exercise discretion? Neither the GAO, courts, nor ASBCA addressed the issue of contracting officers' discretion nor have they discussed limitations with regard to 52.217-8. So in moving forward, it is important that future revision efforts avoid imposing limitations on when contracting officers may exercise FAR 52.217-8 extensions, otherwise the result could be creation of an atmosphere where contracting officers are afraid to exercise discretion—not just in regards to FAR 52.217-8 extensions, but in other aspects of government contract formation and administration.

VIII. CONCLUSION

GAO's 2009 decisions in *Major Contracting Services, Inc.* and the reconsideration decision threw the contracting community, specifically the DoD, into a frenzy with regards to the use and application of FAR 52.217-8, Extension of Services. The decision called for agencies to specifically evaluate FAR 52.217-8 extensions as a part of the initial competition. As the Army's request to reconsider GAO's initial decision and it's request to open a FAR case suggest, a separate evaluation of the clause was not something agencies were in the practice of doing. This was mainly because the FAR provided no guidance as to how to conduct

[327] *See supra* note 280 and accompanying text.

evaluations of an extension that may not be used and for a period of performance that could not be determined during initial competition.

The guidance provided in the FAR lacked specificity in the appropriate application and use of FAR 52.217-8. There was no guidance in the language "beyond the control of contracting offices" nor was there any clarification on pricing or the evaluation of pricing "within the limits and at the rates specified in the contract." Furthermore, the FAR did not attempt to distinguish FAR 52.217-8 extensions from FAR 52.217-9 options nor did it clarify whether they were to be treated the same. Even the history of the clause and its associated clauses failed to address these issues—to include the wording "within the limits and at the rates specified in the contract"—which would later be addressed 20 plus years after the creation of FAR 52.217-8.

The decisions of the Court of Appeals for the Federal Circuit, the Court of Federal Claims, and the Armed Services Board of Contract Appeals also contained no guidance with respect to the evaluation of FAR 52.217-8 clauses. In fact, they all previously upheld agencies' use of the rates from a preceding option period as valid exercises of FAR 52.217-8. The decisions are silent with regards to the particular evaluation of the clause and seem to be in conflict with GAO's opinion.

The unsuccessful efforts to revise both the FAR and DFARS only showcase the confusion with regards to the proper application and use of FAR 52.217-8. Instead of affording contracting officers the discretion on when to exercise the clause, the revision efforts were stifled by the contracting community's inability to

agree on the proper use of the clause. Specifically, the standstill concerned proposed limitations on the use of the clause.

In order to continue to promote efficiency that the clause was initially intended to promote, another revision attempt needs to be accomplished. The goal should be to assist contracting officers in complying with the evaluation requirements that GAO held were necessary for the proper application of FAR 52.217-8. The revision should steer clear of placing any more limitations on the use of the clause so as to avoid the creation of a climate where contracting officers are afraid to exercise discretion. Rather, this revision must focus specifically on the ambiguity in both FAR 37.111 and FAR 52.217-8. Specifically, to clarify the language "within the limits and at the rates specified in the contract."