

PTAC Link

PROCUREMENT TECHNICAL ASSISTANCE CENTER – CONNECTING BUYERS & SUPPLIERS

Progress Through Regional Cooperation In The Alleghenies

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Happy New Year 2016 from the Southern Alleghenies PTAC staff! We're looking forward to helping you in the upcoming year with any aspects in government contracting!

Looking ahead, we have some interesting outreach events, such as Contract Accounting and a PTAC Open House. As we firm up dates, we'll get the information out to you.

Thank you again,
James, Brandon & Gloria

The 3 Things Every Small Business Contractor Should Know

The 'Nudum Pactum' Mistake

One of the three basic requirements for a contract to be enforceable is consideration, which usually means a promise to pay money, but could mean that another valuable item would be provided instead (as in a trade, for example, of one valuable car for another valuable car).

In federal procurement contracts, the courts have said that to be a valid contract, the transaction "must show a mutual intent to contract including an offer, an acceptance and consideration." If there's no consideration, is it a contract? The answer is simple: it's a "nudum pactum" and there is no valid contract.

A "nudum pactum" is defined as a "bare agreement," a promise or undertaking without any consideration for it. Where there is a "nudum pactum," the contract is neither valid nor enforceable.

Government contractors must be wary of performing under a "nudum pactum." They likely will not be paid for their goods or work, and unlike a valid contract, the contractor will have no recourse to courts. The issue primarily arises where the contract contains one or more "availability of funds" clauses.

An example: The New Iraq Ahd Company signed an agreement with the Army to construct a fence for the 25th Infantry division, but the contract stated that there was "no legal liability on the part of the government for any payment ... until funds are made available to the contracting officer for this contract and the contractor receives notice of such availability, to be confirmed in writing by the contracting officer."

Although the company spent \$175,440 to buy materials, the funding never became available, and the contracting officer never provided notice of funds availability to the contractor. New Iraq recovered nothing in litigation because there was not contract to enforce -- it lacked consideration and was purely a "nudum pactum."

This same situation can arise for other contractors whenever the government includes "availability of funds" clauses. These clauses are included in most contract for services, usually buried in the clauses around page 30, and state that "no legal liability on the part of the government for any payment may arise until

Often overshadowed by their larger, multibillion dollar prime counterparts, small business contractors are critical to the federal government community. With billions awarded in set-asides each year, small business has become big business for eager capture executives looking to identify new opportunities.

On Nov. 10, Bloomberg Government's Paul Murphy, Duncan Amos, Dan Snyder and AECOM's James Daly hosted a webinar analyzing the importance of small business set-asides. The presentation discussed recent set-aside spending at civilian and defense agencies and how a growing share of small-business obligations are being awarded via set-asides.

No time to watch the [replay](#)? No problem. We've pulled together the top three things every small business contractor should know.

1). **Small business set-asides have reached a 15-year high**

In fiscal 2014, set-aside awards won by small business accounted for \$57 billion, or 13 percent of overall federal procurement. Set-asides represented 58 percent of the federal money obligated to small business in fiscal 2014, also an all-time high, showing the growing importance of small businesses and set-asides in the federal marketplace.

2). **Alaska Native Corporation contracting is at its highest level ever**

Despite a recent reduction in federal contract spending, ANC contracting surged 26 percent between FY 13 and 14. Alaska Native Corporation (ANC) contract obligations are in the billions of dollars with obligations skyrocketing on set-asides and 8 (a) competitive awards.

3). **Small business graduation means new opportunities are available**

Many incumbent small businesses have graduated from small-

funds are made available to the contracting officer for this contract and until the contractor receives notice of such availability, to be confirmed in writing by the contracting officer."

Agencies frequently use these clauses when awarding a contract at the end of one fiscal year, when the contract begins in the next fiscal year. However, the agency has not received its funds and the Anti-Deficiency Act prohibits the government from spending money that has not yet been appropriated. It's a typical problem where the government wants to continue a contract for services on Oct. 1, but doesn't yet have its funding.

If this clause is in a contract, it is a "nudum pactum" until the contracting officer receives funds, and the same contracting officer provides the contractor with notice of the availability of funds.

Meaning: Do not deliver any goods or perform any services until you receive that written notice of availability of funds. You are likely never to receive payment.

Contractors need to make sure that there is consideration (money) placed on the contract. The "availability of funds" clauses protect the government from overspending. But if no funds are available on the contract, there's no money, and the contractor shouldn't do any work until the contracting officer notifies it in writing that there are funds on the contract.

For example, if you are performing a services contract and there's no money on the contract as of Oct. 1, you should stop work until the funds become available. Your contracting officer may ask you to continue without funds, but you could be making a big mistake.

*Article posted courtesy of [Richard Lieberman](#)
Mr. Lieberman is a consultant and retired attorney. This article does not provide legal advice as to any particular transaction.*

Are Sole Source Specifications Enforceable?

A sole source specification restricts a bidder to providing materials, equipment, or labor, from one source. For example, a specification that requires the contractor to furnish a 1200 ton Trane CenTraVac® chiller would preclude furnishing any other make or model of chiller.

Sole source requirements are enforceable on private projects where the parties are free to contract with whomever and for whatever they want, so long as their contract is lawful and does not violate public policy. But sole source requirements can conflict with the policy behind public procurement laws that require competitive procurement to avoid squandering of public funds, cronyism, and corruption.

If a public entity wants a sole source specification on a public project, it must overcome the presumption that its purpose for the specification is to evade the competitive procurement laws. To do this, the public entity must have a rational basis to explain why a less restrictive specification would not, due to special

business size standards on major MACs, preventing them from competing for the small-business portion of re-competes. What this means? New opportunities are available for other small businesses to win these slots.

Article posted courtesy of David Boyajian

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circumstances, meet its needs. For example, the Department of Defense may require installation of a 1200 ton Trane CenTraVac® chiller if the rapid cooling requirements of this chiller are needed to protect records stored in a mission critical data center, but not if the another chiller's cooling characteristics would provide adequate protection, or if the chiller is specified for a building where rapid cooling would be nice, but not necessary.

A recent controversy involving a sole source solicitation illustrates the need for a rational justification. The State Department had awarded a 5-year, \$16.5 million no-bid contract to Amazon® to provide Kindle® e-readers for second language teaching overseas. The State Department rationalized its sole source solicitation by explaining that this was "the only e-Reader on the market that meets the Government's needs...and Amazon [was] the only company possessing the essential capabilities required by the Government." After a widespread criticism of its rationale, the State Department cancelled the contract, and proceeded with a competitive proposal process open to all qualified bidders.

Some specifications overtly require a sole source. Others are more subtle and their nature as a sole source specification does not become apparent until the contractor tries to meet the technical requirements of the specification. The engineer responsible for this type of specification may not have intended to specify a sole source, in which event it is more likely that the public entity cannot provide a rational basis for the use of the restrictive technical requirements. Including the words "or equal" will not save a sole source specification if only one source meets the specifications.

The fact that a product is covered by a patent or other proprietary right alone does not justify specifying that product as a sole source. Rather, the public entity would need to provide a rational basis for why that proprietary product is necessary due to its special circumstances.

All states have procurement laws that set standards for sole source procurement. These laws typically address matters such as: approval authority; standards and justification for sole source procurement; standards for cost, pricing, and negotiating; record keeping and reporting requirements; specific applications to specific agencies or to specific goods or services; and exemptions from approval requirements.

Georgia's law defines a sole source as "those procurements made pursuant to a **written determination** by a governing authority that there is only one source for the required supply, service, or construction item." O.C.G.A. § 36-91-2 (emphasis added). Thus, if a public entity plans to specify a sole source, it must provide a rational basis for doing so in writing, explaining why a less restrictive will not meet its special circumstances, and then obtain approval for such sole source by the supervising fiscal authority. On a local project, the supervising fiscal authority will typically be the board of commissioners or city council in that locality.

As a result, public entities should (1) determine whether they have special circumstances that require a restrictive specification, (2) research whether a less restrictive specification

will meet their needs, (3) contact multiple vendors to determine whether their products could be used to meet the public entities' needs, and (4) comply with the State and local requirements for sole source solicitation. As recognized by the Association County Commissioners of Georgia, the Internet is an invaluable tool to find other firms that provide the same product or are authorized to install particular products.

One potential loophole to the restrictions on using sole source specifications is through the small dollar procurement exception to the competitive procurement laws. This exception effectively allows use of a sole source if the engineer's estimate of the project's cost is less than the statutory threshold. For example, Georgia's public procurement laws do "not apply to public works construction projects, when the same can be performed at a cost of less than \$100,000.00." Public entities in Georgia should be aware, however, that they could be in violation of these laws if they purposely subdivide a project into multiple small dollar projects to evade the provisions of Georgia's competitive procurement laws.

In sum, the public procurement laws recognize that sole source specifications may be used in special circumstances; otherwise, it is unlawful for the public entity to either specify a sole source, or draft a specification in such a way that only one source can meet it.

*Article posted courtesy of
Darren Rowles and Scott Cahalan*

About Us

The PTAC at SAP&DC is an economic development entity that bridges the gap between supplier and buyer in the government marketplace. The PTAC stands ready to support businesses in the Alleghenies region in their pursuit to secure contracts with local, state and/or federal government agencies nationwide by:

- Identifying niche government markets and specific contract opportunities
- Assisting with bid and proposal preparation
- Preparing the required vendor registrations
- Navigating your company through the requirements and procedures of government contracting
- Enhancing competition by obtaining applicable socio-economic certifications
- Providing guidance to ensure successful post-award contract performance

Due to the generous support of our Commonwealth and Federal funding partners, services provided by the PTAC are free of charge.

Whether you are an experienced contractor or new to the government marketplace, the PTAC will provide one-on-one counseling utilizing the following program resources

to increase your share of contact awards.

PTAC Resources

- Electronic Bid Matching for products and services
- Military/Commercial specifications and standards
- Past procurement information and pricing histories
- State and Federal regulations guidance
- Professional training and outreach events
- Quality assurance and packaging guidance

Contact us today at [The PTAC at SAP&DC](#) to get started!



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