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Max and Ralph: Unruly Children of Limited-Form Requirements Contracts

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David E. Boelzner*

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I. Introduction

The problem is a familiar one in hundreds of government agencies, federal, state, and local: the needs of the agency or the demands for its services exceed the capabilities of permanent staff. Unable or unwilling to enlarge the staff, an agency often will obtain temporary appropriations to procure supplementary services from a commercial source.

Such a procurement raises the challenge of devising a contract that will protect expectations of both the government agency and the outside contractor. Two conditions inherent in these procurements rule out classic types of enforceable contracts. First, the quantity of services needed from the outside source, because it depends upon demand or other variables, will be unknown and indeterminable except perhaps within some range estimated from historical data. Second, the agency has the ability and the desire to perform with its own staff some but not all of the necessary services.

The lack of precisely quantifiable need obviously rules out a definite quantity contract. A pure contract for an indefinite quantity would lack mutuality of consideration and would therefore be unenforceable except to the extent it actually is performed; that is, the

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contractor's fortune would depend entirely upon the whim of the government agency placing orders.¹

The indefinite quantity contract could be made enforceable if the agency were willing to guarantee the contractor a minimum payment regardless of actual demand for the services, but this places the risk of faulty estimating on the agency's budget. In other words, to furnish non-illusory consideration sufficient to create an enforceable contract and attract bidders, the agency may run the risk of paying for unnecessary services.

An alternative to the indefinite quantity contract with guaranteed minimum is the requirements contract, where the agreement to purchase exclusively from one contractor provides the necessary consideration to the contractor and thus reduces or eliminates the need for any minimum guarantee.² The classic requirements contract, however, demands that the agency procure all services of the type needed from the contractor.³ It thus fails to address the second condition of these supplemental procurements because the agency may not perform any of the work in-house.⁴

II. Limited-Form Requirements Contracts

The Federal Acquisition Regulation (FAR) provides contracting officers with a species of agreement that would appear to answer the need for a hybrid between the indefinite quantity and the requirements contract. FAR Clause 52.216-21 defines the scope of work to be procured from the contractor as "all supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule."⁵

Boards of Contract Appeals (BCAs) have interpreted this definition of contract scope as requiring the agency to buy from the contractor all goods or services that the agency cannot provide with its own capabilities. The BCAs have thus upheld the validity of what they term "limited-form" requirements contracts,⁶ where the exclusive

1. *Ralph Constr. Inc. v. United States*, 4 Cl. Ct. 727 (1984). Such an agreement, unenforceable against the government, should likewise be unenforceable by it. *But see Kozac Micro Sys. Inc.*, GSBCA No. 10519, 91-1 BCA ¶ 23,342 (1990), discussed *infra* notes 36-43 and accompanying text.

2. *Brawley v. United States*, 96 U.S. 168, 172 (1878); *Shader Contractors, Inc. v. United States*, 149 Ct. Cl. 535, 540-43, 276 F.2d 1, 4-6 (1960).

3. *Torncello v. United States*, 681 F.2d 756, 761-62, 768 (Cl. Ct. 1982).

4. *Ralph Construction*, 4 Cl. Ct. at 733.

5. FAR 52.216-21(c).

6. *Dynamic Science, Inc.*, ASBCA No. 29510, 85-1 BCA ¶ 17,710 (1984); *Export Packing & Crating Co.*, ASBCA No. 16133, 73-2 BCA ¶ 10,666 (1973).

promise to buy everything that must be bought serves as the consideration running from the government to the contractor.

Under such a scheme, the contractor will not perform as much work as it would under a straight requirements contract, where it must meet all the agency's needs for the particular good or service. Despite the lower volume, if the government deals in good faith and the contractor does its homework on the agency's in-house capacity, the contractor should run no greater *risk* than under a straight requirements contract. The agency's capacity will be a constant and the contractor's work volume will still depend directly and exclusively upon actual need.⁷

III. Limited-Form Requirements Contracts in the Court of Federal Claims

The Court of Federal Claims, unlike the BCAs, has had considerable difficulty accepting this hybrid contract. A contractual interpretation in that court can potentially spell disaster for either the agency or the contractor. If the contract purports to be for requirements, but expressly reserves the right of the agency to perform some of the work in-house, the court may read the agreement as an unenforceable contract for an indefinite quantity and the contractor will have no rights under it. On the other hand, if the contract does not explicitly withhold the right of the agency to perform part of the subject work in-house, but is instead drafted with the "required to be purchased" language of FAR 52.216-21 (Clause 21), a recent decision of the Court of Federal Claims indicates that the agreement may be treated as a straight requirements contract, under which any work done in-house by the agency may constitute a breach by the government.

A. *Ralph Construction*

The leading case in the claims court⁸ articulating the result adverse to the contractor is *Ralph Construction, Inc. v. United States*.⁹ The agency's situation in *Ralph* was precisely the common one described above: it needed supplemental routine maintenance work on military housing beyond what it could do with its own resources. The contract explicitly provided that the quantities to be purchased were

7. See *infra* discussion of *Max Contracting* in section III.

8. This term is used to refer to the variously named manifestations of what is now the Court of Federal Claims.

9. *Ralph Construction*, 4 Cl. Ct. 727 (1984).

“not the total requirements of the activity named in the Schedule” but were “estimates of requirements in excess of the quantities which such activity may itself furnish within its own capabilities.” The contractor filed suit because the government assigned work in-house instead of filling all of its maintenance needs from the contractor.

Relying on two earlier claims court cases, *Torncello v. United States*¹⁰ and *Mason v. United States*,¹¹ the court started with the proposition that the contract had to fall into one of three categories: definite quantity, indefinite quantity, or requirements. Obviously, it was not the first. The contractor was apparently surprised to learn that the contract was not under the third category.

The court held that the agreement had “none of the elements necessary” for a requirements contract, noting that definition of a contract is a question of law uncontrolled by the parties’ labels or interpretations. Despite the contractual declaration, the stipulation of the parties, and the manifest understanding of the contracting officer and other government employees that it was a requirements contract, the court found it to be an unenforceable indefinite quantity contract.¹²

In the court’s view, the fatal flaw was that the agency had not procured, or agreed to procure, all of its maintenance needs from the contractor, but had retained the right to perform some of the maintenance in-house. Because there was no commitment for all needs, the agreement was merely for an indefinite quantity with no guaranteed minimum, and thus unenforceable as a contract under the U.S. Supreme Court’s ruling in *Willard, Sutherland & Co. v. United States*.¹³

Nash and Cibinic have criticized the analysis in *Ralph* because it ignores the question of what the requirements were. All requirements beyond what the agency itself could meet were to be satisfied by Ralph Construction, Inc., and this exclusivity constituted sufficient consideration to support the contractor’s promise to perform.¹⁴ As has already been noted, this exclusivity is the only consideration for the contractor’s obligations in any requirements contract, whether “straight” or “limited-form.” In the former, the risk for the contractor is that there will be no requirements at all; in the latter

10. *Torncello*, 681 F.2d 756, 761 (1982).

11. *Mason v. United States*, 222 Ct. Cl. 436, 444, 615 F.2d 1343, 1347 (1980).

12. *Ralph Construction*, 4 Cl. Ct. at 731.

13. *Willard, Sutherland & Co. v. United States*, 262 U.S. 489, 493 (1923) (nothing in the contractual writing “required the government to take, or limited its demand, to any ascertainable quantity”).

14. Nash and Cibinic, *FORMATION OF GOVERNMENT CONTRACTS*, 807 (2d ed. 1986).

that there will be no requirements exceeding the procuring agency's in-house capability.

FAR Clause 21 appears to accomplish exactly what Professors Nash and Cibinic saw in *Ralph*, a definition of *requirements* in terms of the work within the contract scope that cannot be performed in-house and therefore must be purchased on contract. BCAs have recognized the validity and enforceability of the FAR-type agreement in *AGS-Genesys Corp.*,¹⁵ *Arcon-Pacific Contractors*,¹⁶ and *Export Packing & Crating Co.*¹⁷ The Armed Services Board recently affirmed this view explicitly in *Operational Service Corp.*, stating in a footnote that it disagreed with the holding in *Ralph Construction*.¹⁸

B. Max Contracting

There is to date no published decision delineating how the United States Claims Court would treat the FAR-type contract, which lacks the reservation of in-house work that subverted the parties' intentions in *Ralph* but nevertheless defines the requirements as those necessarily purchased outside. However, the court has recently considered a contract of this type and issued an unpublished decision suggesting the court is not prepared to acknowledge the limited-form type of contract, even as effectuated by FAR Clause 21. In contrast to the adverse result for the contractor in *Ralph*, however, the government was thwarted in *Max Contracting, Inc. v. United States*.¹⁹

Max Contracting entered into an agreement with the National Gallery of Art under which Max would provide painting and finishing services for a number of temporary exhibitions scheduled to occur at the gallery. The gallery made no express reservation of the right to perform some of the work on these exhibitions with its own painters, but the contract included FAR Clause 21. Midway through

15. *AGS-Genesys Corp.*, ASBCA No. 35302, 89-2 BCA ¶ 21,702 (1989).

16. *Arcon-Pacific Contractors*, ASBCA No. 25057, 82-2 BCA ¶ 15,838 (1982).

17. *Export Packing & Crating Co.*, ASBCA No. 16133, 73-2 BCA ¶ 10,066 (1973).

18. *Operational Service Corp.*, ASBCA No. 37059 *et al.*, 93-3 BCA ¶ 26,190 (1993). In *Modern Systems Tech. Corp. v. United States*, 979 F.2d 200 (Fed. Cir. 1992), the Federal Circuit Court of Appeals affirmed a Claims Court decision, 24 Cl. Ct. 360, 11 FPD 1 (1992), and adopted the Claims Court's opinion, which contained the comment that in *Ralph* the absence of a requirement that the government order all of its needs from the contractor rendered the agreement unenforceable. The board in *Operational* stated that it did not regard the Federal Circuit's affirmation of *Modern Systems* as an adoption of the *dicta* regarding *Ralph* (or, presumably, of *Ralph's* position on this question). *Operational Service Corp.*, ASBCA No. 37059 *et al.*, note 1. *Modern Systems* did not involve a contract under FAR Clause 21 and the comment sheds no light on how the Court of Federal Claims will deal with these agreements.

19. No. 92-10C (April 28, 1993). *Max Contracting v. United States*, No. 92-10C (Cl. Ct. April 28, 1993).

the contract, the gallery obtained authorization to hire an additional full-time painter/finisher. It hired Max's foreman, who subsequently worked on some temporary exhibitions that were the subject of Max's contract. The agency did not reduce orders from Max; in fact, Max's work actually increased toward the end of the contract. Max sued, however, for the additional profits it would have earned had it been assigned the work that was performed by the foreman after the gallery hired him.

The government argued first, under the authority of *Ralph Construction*, that the contract was not for requirements but rather for an indefinite quantity. Because the contract specified a core crew to be available at all times, the government contended that there was a guaranteed minimum sufficient to render the agreement enforceable. Second, the government argued that gallery painters had throughout the contract term worked alongside the Max crew on the temporary exhibitions, and nothing in the contract prevented this practice. In other words, if it was a requirements contract, it was of the limited form.

The court rejected both contentions, and in the process cast considerable doubt on the validity of limited-form requirements contracts. The opinion in *Ralph*, the court said, had "analyzed a 'limited-form' contract and found that 'the unfettered right of the government to perform work in-house renders the contract unenforceable because of the lack of mutuality of consideration.'" ²⁰ *Max* was distinguishable from *Ralph*, however, in that the National Gallery had not expressly reserved the right to perform work in-house. The court regarded this point as significant:

[M]any valid requirements contracts do not *expressly* forbid the buyer from filling its own needs. See *Brawley*, 96 U.S. at 169; *Inland Container, Inc. v. United States*, 206 Ct. Cl. 478, 484-85 (1975); *Shader*, 149 Ct. Cl. at 540. However, this does not mean that buyers are free to supply their own needs. As stated in *Shader*, under a requirements contract, "[t]he other party *implicitly* promises that he will obtain his required goods or services from the first party *exclusively*." (emphasis added [by Court of Federal Claims]) 149 Ct. Cl. at 540. Therefore, it is implicit in a valid requirements contract that the buyer must not supply its service requirements with other labor.²¹

Counsel for Max had invited the court to seize the distinction between the two contracts—*Ralph*'s express provision for in-house work versus *Max*'s definition of *requirements* in terms of the needs

20. *Slip op.* at 6. The court in *Ralph* did not employ the term "limited form" and did not discuss this species of contract as treated by the Boards of Contract Appeals.

21. *Slip op.* at 6-7.

beyond agency capability—as an opportunity to embrace the limited-form type of contract as set forth in the FAR without disturbing the holding in *Ralph*.²² The court acknowledged that the BCAs have found adequate mutual consideration in the FAR-type of contract,²³ but saw no need to adopt this view itself.

Instead, the court focused on the same distinguishing feature, the *Max* contract's lack of explicit retention of in-house work, but reached a result unanticipated by either of the contracting parties; for although there was disagreement about the parties' expectations regarding in-house work, the parties agreed that *as written* the contract did not preclude the gallery from doing some of the work in-house. The court rejected the parties' understanding and, noting that the only term possibly open to interpretation was *requirements*, said: "Case law is well-settled that in a valid requirements contract the term 'requirements' means 'all such requirements as do develop.'"²⁴ The court held that on its plain language, the *Max* contract was for straight requirements.

The inescapable conclusion from this language in the context of the court's decision of *Ralph Construction* is that performance of any of the contract work by the gallery's painting staff would have been impermissible under this FAR-type contract. To the extent the unpublished opinion in *Max* represents the present view of the Court of Federal Claims, it indicates that the analysis of *Ralph*, particularly the latter's rigid classification of contract types, retains its validity, and the limited-form requirements contract, even as drafted in the FAR, will not be recognized in that court.

As shown above, the effects of this doctrine on the parties' intentions have been difficult to predict. In *Ralph*, the contractor unexpectedly found itself with no enforceable promise of work from the government beyond what had actually been bestowed. In *Max*, the government argued that the National Gallery's performance of in-house work from the inception of the contract indicated that there had been no breach when the gallery hired *Max*'s foreman,²⁵ only to

22. The ASBCA relies on this difference in language as the basis for differing levels of discretion afforded an agency in determining its requirements. See *infra* discussion in notes 33–40.

23. *Slip op.*, n.3.

24. *Slip op.* at 7 (citations omitted).

25. The argument was that the foreman hired away from *Max* had succeeded one of the National Gallery's staff painters already assigned to the contract work, and the gallery painter had then simply returned to his heretofore neglected regular duties.

learn that in the court's view all such in-house performance would constitute breach of what was a straight requirements contract.²⁶

As noted at the outset of this article, the limited-form agreement serves a useful function for hard-pressed government agencies with inadequate resources that they may wish to supplement through private-sector vendors. *Max* is an unpublished decision, and although its reasoning seems to affirm the *Ralph* analysis of these contracts, it does not explicitly decide that limited-form contracts cannot under any circumstances be judicially condoned. It is hoped that the Court of Federal Claims will reach the conclusion of the BCAs, i.e., this sort of hybrid contract meets a genuine commercial need and rests on no skimpier consideration than does a straight requirements contract if the contractor exercises diligence and the government deals in good faith.²⁷

IV. The Government's Obligation

What the government's good faith obligation entails has not always been made clear in the BCA jurisprudence upholding limited-form contracts. In the cases of *Henry Angelo & Sons, Inc.*,²⁸ and *Maya Transit Co.*,²⁹ the BCAs held it to be improper for the agency to redistribute its own capabilities to reduce orders to the contractor. *Max Contracting's* claim was based on this principle of non-diversion of contract work in-house, alleging that the National Gallery had impermissibly augmented or reallocated its workforce to reduce requirements to be purchased.

26. *Max* was settled before any ultimate resolution of the issue of breach and its extent.

27. It is noteworthy that a Court of Claims decision, *Franklin Co. v. United States*, 381 F.2d 416 (1967), acknowledged a limited type requirements contract some six years before the ASBCA first coined the term "limited form requirements contract" in *Export Packing & Crating Co.*, ASBCA 16133, 73-2 BCA ¶ 10,066 (1973). In *Franklin*, the court found that the government had contracted to assign portions of a technical manual preparation program to each of two contractors, allocated based on the customary tasks performed at each of two Army depots. The court held this arrangement enforceable:

The Government was obligated to make a good faith effort to assign to Franklin those aspects of the technical manual program which were customarily given to the Marion Depot. Franklin, in turn, agreed to do this assigned work at specified fees. Neither party was wholly at large. The mutual undertakings formed a limited type of requirements compact sanctioned at law.

381 F.2d at 420 (citations omitted).

28. *Henry Angelo & Sons, Inc.*, ASBCA No. 15082, 72-1 BCA ¶ 9356 (1972).

29. *Maya Transit Co.*, ASBCA No. 20186, 75-2 BCA ¶ 11,552 (1975).

On the other hand, the opinion in *Arcon-Pacific Contractors*³⁰ states that where the contract specified acquisition from the contractor of “all services required to be purchased,” the Army “had discretion to determine what painting was ‘required to be purchased’ ” outside the agency and was permitted to perform work in-house with troop labor. The board’s holding in the case, however, was narrower than its *dicta*; the Army was held liable for work diverted to another contractor but not for work it failed to order because of lack of funding. The question of the government simply choosing to do the work itself rather than order from the contractor was not an issue.

Similar to the statement in *Arcon-Pacific* are *dicta* in *Dynamic Science*, characterizing the government’s obligation under a limited form contract as purchasing all requirements it “*did not choose* to meet from its own capabilities.”³¹ Other cases cited³² as authority for an agency’s unfettered discretion to change its requirements by internal manipulation are *Export Packing & Crating Co.*, in which the board approved an agency’s decision to assign work to civilian employees of the agency rather than order under the contract;³³ *Hilton’s Cleaners, Inc.*,³⁴ in which a change in military recruiting and uniform issuance policies, which decreased contract orders, was held permissible; and *AGS-Genesys Corp.*,³⁵ which states that the government is required only to order its actual needs and estimate its requirements in good faith and with due care.

It is doubtful that this line of cases stands for the proposition that a government agency has discretion under a FAR-type contract to alter its in-house capabilities from what they were at the inception of the contract and thereby reduce its requirements of the contractor. If so, the government’s promise to procure all of its outside requirements from the contractor becomes illusory, because the requirements can be manipulated to thwart the contractor’s expectations.

By way of illustration, consider again the agreement in *Max Contracting*. Assuming the contract between Max and the National Gallery was for limited requirements, and assuming Max had calculated its bid based on some research into the gallery’s in-house capability

30. *Supra* note 16, at 78,516. *Arcon-Pacific Contractors*, ASBCA No. 25057, 82-2 BCA ¶ 78,516 (1982).

31. *Supra* note 6, at 88,383.

32. See *Kozac Micro Systems*, GSBCA No. 10519, 91-1 BCA ¶ 23,342 (1990).

33. *Supra* note 6. A plausible reading of this case is that the disputed work was not clearly part of the requirements included in the contract; thus, the decision does not stand for the agency’s right to withhold work orders by mere choice.

34. *Hilton Cleaners, Inc.*, ASBCA No. 18213, 74-1 BCA ¶ 10,433 (1974).

35. *Supra* note 15.

at the time of the solicitation, could Max rely on that capability remaining unchanged? Or was the gallery free to decrease its requirements by augmenting its in-house staff by adding a full-time painter?

The BCA cases tie the amount of discretion the government has in placing orders to the language of the purchase requirement in the contract, whether it is a FAR-type specification of all goods or services "required to be purchased" or an express allocation of all goods or services "in excess of the agency's own capacity." Under the latter language the agency has less discretion than under the former,³⁶ and the answer to the question posed above is clear. When the contract is for the excess above the agency's capabilities, the boards have interpreted "capabilities" to mean those existing at the time of award, and have held that decreases in purchase requirements caused by subsequent government expansion of its capabilities are compensable, either as a contract change or a partial termination for convenience.³⁷ The ASBCA's opinion in *Dynamic Science* says explicitly that "the government was precluded from expanding its capabilities during contract performance at the expense of the contractor."³⁸

Less clear is exactly how much discretion the government has under the FAR "required to be purchased" definition of requirements. As seen above, despite broad *dicta* in *Arcon-Pacific*, the holding in that case does not rely on the government's supposed discretion, if "discretion" is defined as "the power of free decision" or "individual choice or judgment."³⁹ The contractor in *Arcon* had understood from the beginning that, while much painting was needed on the Army base, how much actually got done would depend on funding levels. The fact that the Army did not obtain as much funding as the work estimates had anticipated did not make the reduction in delivery orders a discretionary act on the part of the government.

The other cases cited as authority for the enlarged discretion of the government under FAR-type "required to be purchased" contracts are similarly uninformative on this point. *AGS-Genesys Corp.*⁴⁰ involved no volitional decision by the government to reduce its

36. *Kozac Micro Systems*, GSBCA No. 10519, 91-1 BCA ¶ 23,342 at 117,058.

37. *Arcon-Pacific*, ASBCA No. 25057, 82-2 BCA ¶ 15,838 at 78,517 (1982); *Kozac*, at 117,058; *Maya Transit*, ASBCA No. 20186, 72-2 BCA ¶ 11,552 (1975); *Henry Angelo*, ASBCA No. 15082, 72-1 BCA ¶ 9356 (1972). By contrast, in the Court of Federal Claims, pursuant to *Ralph Construction*, a contract with this limitation is an unenforceable indefinite quantity contract.

38. *Supra* note 6, at 88,383.

39. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1986).

40. *Supra* note 15.

requirements. Indeed, the board had no evidence before it showing why no requirements arose during the contract term in issue. The holding of *Export Packing*, as discussed above,⁴¹ also does not cite agency discretion as grounds for denying the contractor's appeal.

The reduced requirements in *Hilton's Cleaners* resulted from a change in the government's recruit training, which reduced the flow of recruits needing alterations of their uniforms under the appellant's tailoring contract. In some sense this change in military policy could be termed discretionary, but the board's opinion does not fasten on this discretion as the primary ground of decision. It relies on cases absolving the government of liability for requirements changes arising from the conduct of peculiarly military affairs, such as the exigencies of training in response to the Vietnam conflict.

Kozac Micro Systems, Inc., the General Services Board (GSBCA) case that most clearly delineates the different levels of permissible agency discretion, depending upon the wording of the requirements clause, presents the one instance where the absolute discretion of the procuring agency is the basis for decision. Under a contract for auditing services, the GSA had promised to forward for financial audit only such bills as GSA deemed "available for audit" and explicitly retained the right to perform audits in-house to the extent it chose to do so. Although the GSBCA expressed dismay that either party would choose to enter into such a risky contract,⁴² it upheld the agency discretion, declaring in a footnote that the contract was a limited-form requirements contract.

The board's declaration was incorrect. Although the agreement referred to procuring "such bona-fide needs as may arise," the retention of an absolute right to screen and select which bills, if any, would be sent out for audit under the contract rendered the promise to purchase the agency's needs illusory. The government had no obligation to procure its actual requirements, as the board rightly perceived. The agency could perform as much work in-house as it chose, irrespective of its capabilities at the time of contracting. The contract was actually one for an indefinite quantity without a guaranteed minimum and was thus unenforceable except to the extent actually performed, which is what the board ruled, in effect though not in its terms.⁴³

41. See *supra* note 33.

42. The board observed: "Why either party would choose to enter into a contract which includes these clauses is beyond us." 91-1 BCA ¶ 23,342 at 117,059.

43. The Comptroller General followed an approach similar to *Kozac's* in *Tucson Mobilephone, Inc.*, B-247685, 92-1 CPD ¶ 487 (1992). The bid protester had argued

As the foregoing illustrates, the greater discretion purportedly afforded the agency by the “required to be purchased” language, as compared to the “in excess of agency capacity” provision, may be largely fictitious. It is suggested here that the board’s focus on the peculiar phrasing of the requirements clause is artificial, and not particularly useful. There is no pertinent semantic difference between a requirement to purchase all services in excess of the agency’s in-house capacity, and one to buy all services that are required to be purchased.⁴⁴ More precisely, the former is a subset of the latter. There could be services within the agency’s capacity that for some other reason are to be procured outside anyway, and thus are “required to be purchased” from the contractor.

The broader point is that absolute agency discretion to choose at will what is procured and performed in-house renders nugatory a contractual promise to purchase requirements, as was the case in *Kozac*. To hold that the “required to be purchased” language confers this degree of discretion is to invalidate the FAR Clause 21-type contract by converting it, as the *Ralph Construction* court would, to what is in effect an unenforceable indefinite quantity contract with no minimum guarantee. As has been seen, despite broad *dicta* that would suggest such analysis, the decisions of the Armed Services Board have explicitly rejected the reasoning of *Ralph*.⁴⁵

Instead, the ASBCA cases speak in terms of good or bad faith on the part of the government.⁴⁶ This distinction offers little more help than does the differentiation between the wording of the requirements definition just discussed, since the cases do not define or illuminate the meaning of these terms. Does bad faith require an intent

that a provision reserving to the government the right to perform certain work “when deemed necessary” by the agency was inconsistent with a requirements contract. The Comptroller disagreed, finding nothing “inconsistent with the nature of the contract” in such a provision. Under the analysis in this article this conclusion is wrong, since the power to deem or not to deem renders the promise to purchase requirements illusory and is clearly inconsistent with it. It must be noted, however, that the agency had interpreted the provision to permit in-house work where no contractor personnel were available or where the repair was easily accomplished with available in-house equipment. This interpretation essentially converted the “when deemed necessary” option into a “required to be purchased” provision, which may account for the Comptroller’s approbation.

44. This point is illustrated by *Export Packing*, ASBCA No. 16133, 73-2 BCA ¶ 10,066 (1973), in which the ASBCA held that the “required to be purchased” language obligated the government to order only its purchase requirements, not those it could accomplish with its own personnel.

45. See *Dynamic Science*, ASBCA No. 29510, 85-1 BCA ¶ 17,710 at 88,383 (1984), noting that the board has taken a view contrary to that of *Ralph Construction*.

46. See, e.g., *Hilton Cleaners*, ASBCA No. 18213, 74-1 BCA ¶ 10,433 (1974); *Arcon-Pacific*, ASBCA No. 25057, 82-2 BCA ¶ 15,838 at 78,516 (1982); *Henry Angelo*, ASBCA No. 15082, 72-1 BCA ¶ 9356 (1972).

to injure the contractor or merely the estimating of requirements without due diligence? Is it bad faith to fail to disclose possible changes in policy that could adversely affect the contract? Language in *Hilton* and *Arcon-Pacific* indicates that a governmental decision made for a good reason, military or even economic, precludes a finding of bad faith. On the other hand, the Army's election to perform painting with government personnel because it could be done more cheaply was ruled lack of good faith in *Henry Angelo*.

Policy arguments militate in divergent directions on this question, a problem that may account for disparate results before the same BCA. The law should promote efficient use of resources, especially when one party is, in effect, the public. Government agencies should be encouraged to implement cost savings by finding the least expensive manner for delivering agency services. Where the contractor has voluntarily agreed to run the risk of decreased requirements, the conservation of public funds by diverting more work in-house may appear to be a perfectly justifiable and, therefore, a "good faith" basis for reducing those requirements.

On the other hand, a diligent contractor predicts its revenue and profit based on the agency's good faith estimate of the volume of work and on the agency's apparent capacity to perform a portion of it. This calculus does not include the prospect of the agency ignoring its routine maintenance chores in order to accomplish more urgent work that would otherwise be purchased from the contractor. Nor does it include the agency's unexpectedly augmenting its internal workforce to increase its capacity. If the solicitation does not disclose the risk of the agency thus manipulating its internal resources, then these are risks the contractor has not knowingly assumed. Indeed, the contractor's preparation, if thorough enough to have researched the agency's capacity, has specifically aimed to avoid these risks.

These observations indicate the proper focus on analysis of limited-form requirements contracts. There is risk associated with any type of contract, owing to impossibility, mistake, impracticability, *force majeure*, and the like. A requirements contract entails greater risk, because the quantum of work is unknown and only roughly predictable. This risk is presumably accounted for in the contract price. *Corbin on Contracts*, section 156, contains the following observation about all requirements contracts:

Much is left to the judgment of the promisor, even to his will and desire; but not everything is thus left. The promise contains one very definite element that specifically limits the promisor's liberty of future action; he definitely promises that he will buy of no one else.

The BCA's treatment of the good faith obligation of the government suggests that, in the practical reality of modern government contracts, *pace* Corbin, exclusivity alone is not sufficient. The viability of the exclusive purchase obligation as consideration for an agreement depends on the contractor having a fair opportunity to evaluate the likelihood of requirements and their quantum. In view of the immense presence and predominance of the government as purchaser, and the unequal bargaining power between the government and contractors, it is sound policy to seek to prevent formation of illusory contracts where the contractor's fortunes depend on the caprice of bureaucrats.

Such a policy suggests that the risk assumed by a contractor in a limited-form requirements contract should be only the risk of unforeseeable events that would reduce or negate the value of the contract. Given that this risk is inherently high in requirements contracts, the contractor should not be asked to assume additional risks that are known or knowable by the government.

The government should have two duties in this regard. The first is to disclose to prospective contractors both (1) its good faith estimate of its future requirements, based upon available historical data and clear project definition; and (2) all known or reasonably identifiable contingencies that could significantly reduce requirements. For a prospective contractor fairly to rely upon this disclosure entails the second government obligation, that it eschew any volitional act that would diminish its requirements under the contract.

Applying this analytical scheme to some of the cases discussed above reveals that it accurately accounts for the decisions of the boards. The second obligation explains the results in *Henry Angelo*, *Maya Transit*, and other cases where the agency augmented its in-house capacity or otherwise diverted requirements to the detriment of the contractor. The opposite judicial result, where the government is not held liable for requirements reduced because of events beyond the promisor's control, is likewise consistent, since the reduction is not volitional. The disclosure obligation explains the result in *Arcon-Pacific*, where the availability *vel non* of sufficient funding was a known and disclosed contingency from the beginning, and thus something the contractor should have factored into its evaluation and bid.

The cases of *Max Contracting* and *Hilton Cleaners* illustrate the advantage of this risk allocation analysis over good and bad faith analysis in guiding the relevant factual inquiry. In *Max*, the gallery obtained approval during the contract term for a full-time position it

had sought for some time. Although it did not know when (or if) approval would be obtained, it had prepared a New Position Description in the same month the contract began, so it knew of the possibility. If it also knew that the new person, if obtained, would be assigned to the contract work, this was a risk of reduced requirements that should have been made known to Max.

This inquiry, whether the contingency was known or reasonably knowable, lacks the moral overtones of a good faith analysis and provides a useful and policy-driven basis for discriminating among the various government actions that can impair requirements contracts. On this basis, the board in *Hilton* would have sought to learn whether the changes in military recruiting that signalled a downturn in Hilton's fortunes resulted from the vicissitudes of war or from policy changes for convenience. If the government had a choice of what it would do, and elected for its convenience to divert work elsewhere, then Hilton should have been compensated in some fashion.

One of the goals of the federal procurement system, as reflected in the FAR's delineation of the contracting officer's duties, is to "ensure that contractors receive impartial, fair, and equitable treatment."⁴⁷ In a requirements contract, the contractor is already undertaking the risk inherent in the uncertainty of the agency's requirements. If the government activity is regular, routine, and historically predictable, this risk may be minimal; if the activity is relatively new, extraordinary, or unpredictable, the risk of the unknowable future may be considerable. Either way, undisclosed intentions or unplanned acts of the government enlarge the range of the unknowable and expand the risk beyond anything reasonably anticipated by the contractor.

The better policy appears to be to ask the government to bear the risk of unanticipated, but nevertheless volitional, adjustments of requirements by the government.⁴⁸ Even if such adjustments are made to pursue efficiency, seizing an opportunity to perform work in-house now that the capability exists, to permit adjustments for this reason would be to inject an unnecessary additional element of uncertainty into requirements contracts. Apart from the unfairness to contractors, this added risk, if routinely imposed, would eventually be reflected in bid adjustments to the government's disadvantage. Or, conversely, if contractors could rely on the law's consistently pro-

47. FAR 1.602-2(b).

48. This parallels the concept of the government opting to terminate a contractor for convenience, where it makes economic sense to do so.

tecting them from this risk, the government should benefit through lower bids.

V. Conclusion

Efficiency and flexibility in public contracting are ill served by the Court of Federal Claims' apparent refusal to acknowledge the limited form requirements contract. This species of agreement can be a legitimate enforceable mechanism for delineating the duties and allocating the risks of the contracting parties in situations where the agency has inadequate in-house capabilities it wishes to supplement.

Limited form contracts, regardless of their precise wording, should be interpreted to require the government to disclose to prospective contractors all information essential to a rational calculation and evaluation of risk, and to refrain from altering that risk calculus during the term of the contract by undertaking deliberate manipulations of agency requirements. Such an interpretation best reconciles the public policies of fiscal efficiency and of straightforward dealing between government and its contractors.