

# Government Contracts Blog

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## New FAR Rule Seeks to Curtail Reach of "Unusual and Compelling Urgency" Justification

The Competition in Contracting Act (CICA) requires that agencies maximize the competition for goods and services and thus requires the use of full and open competition when soliciting offers and awarding government contracts. 10 U.S.C. § 2304; FAR 6.101. An agency satisfies this requirement through the use of "competitive procedures," which include procedures such as sealed bids, competitive proposals, and multiple award schedules. An agency may employ a competitive procedure (or combination thereof) that is best suited for the procurement and allows the agency to fulfill efficiently its requirements.

There are circumstances, however, under which agencies may limit competition. An agency may, for example, invoke an exception to full and open competition when only "one responsible source" can satisfy the agency's requirements or the disclosure of the agency's needs would compromise national security. An agency also may bypass full and open competition if its "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."

On October 14, 2009, the Federal Acquisition Regulation (FAR) was amended to limit the length of contracts awarded under the "unusual and compelling urgency" exception to full and open competition. The final rule was prompted by Section 862 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law No. 110-417, and an Office of Federal Procurement Policy Administrator's Memorandum (May 31, 2007), which sought to enhance competition in federal acquisitions. The final FAR rule applies to contracts that exceed the simplified acquisition threshold -- generally \$100,000 -- and provides that the total period of performance for such contracts awarded pursuant to the exception cannot exceed the time necessary:

- "To meet the unusual and compelling requirements of the work to be performed under the contract"; and
- "For the agency to enter into another contract for the required goods and services through the use of competitive procedures."

FAR 6.302-2(d)(1)(i)-(ii), (d)(3). The final FAR rule also provides that the total period of performance shall not exceed one year unless the head of the agency determines that "exceptional circumstances" apply. *Id.* at 6.302-2(d)(2). The determination of "exceptional circumstances" is in addition to the "justification and approval" required to invoke the unusual and compelling urgency exception. *Id.* at 6.302-2(d)(4).

Apart from these recent changes, an agency's use of the "unusual and compelling urgency" exception was already subject to several limitations, which derive both from regulation and case law. For instance, an agency:

- must provide a written "justification and approval" that "contains sufficient facts and rationale" to support its use of the exception.
- must solicit offers from as many potential sources as is practicable under the circumstances.
- may not rely on the exception if its use was brought about by the agency's lack of advance planning or funding concerns.

Interestingly, the Government Accountability Office (GAO) and Court of Federal Claims (COFC) have long applied limitations similar to those being imposed by the new FAR rule. By way of example, the GAO and the COFC have held that an agency may only procure goods or services sufficient "to satisfy the immediate urgent requirement." *Signals & Sys., Inc.*, Sept. 21, 2001, B-288107, 2001 CPD ¶ 168; *Filtration Dev. Co., LLC v. United States*, 60 Fed. Cl. 371, 381 (2004). Similarly, the GAO and the COFC have explained that an agency's invocation of the "unusual and compelling urgency" exception "should not continue for more than a minimum time." *Tri-Ex Tower Corp.*, Sept. 17, 1990, B-239628, 90-2 CPD ¶ 221; *Filtration Dev. Co., supra*. Thus, both the GAO and the COFC previously imposed "inherent" limitations on an agency's invocation of the "unusual and compelling urgency" exception, which have now manifested themselves in the new FAR rule.

In conclusion, while the new FAR rule imposes specific, explicit limitations on an agency's use of the "unusual and compelling urgency" exception, similar restrictions have been enforced by the GAO and the COFC for quite some time. Nevertheless, the new formalities in the FAR will provide concrete limitations and procedural safeguards that should heighten agency awareness of the exception's limitations and, consistent with CICA's mandate, should promote full and open competition in agency award decisions.

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