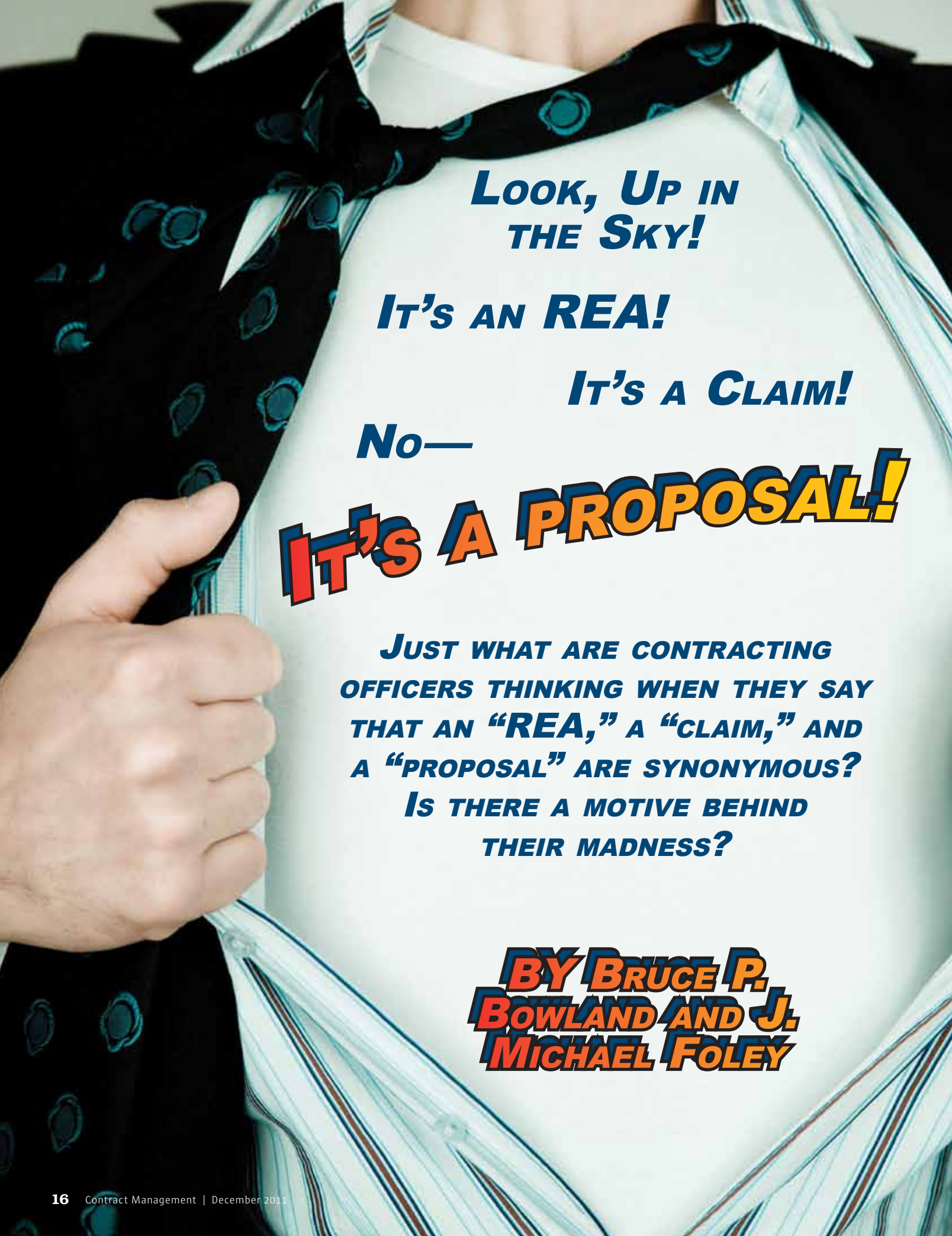

Look, Up in the Sky!

It's an REA!

It's a Claim!

No—

It's a PROPOSAL!

Just what are contracting officers thinking when they say that an "REA," a "claim," and a "proposal" are synonymous? Is there a motive behind their madness?

BY Bruce P. Bowland and J. Michael Foley

A disturbing development and deviation from regulatory guidance has been evolving in U.S. federal government contracting over the last couple of years. Contracting officers from various government procurement agencies have been espousing that requests for equitable adjustments (REAs) are no different than proposals. In fact, they have opined that there is no difference between a proposal, an REA, and a claim. Contracting officers have professed on more than one occasion that these three terms are, in fact, synonymous.

Based on this interpretation of these processes, some contracting officers feel they can apply *Federal Acquisition Regulation* (*FAR*) Part 15, "Contracting by Negotiation," rules to the contract administration process of adjudicating an REA. Contracting officers interpreting that the REA process is covered under *FAR* Part 15 rules are making the further assumption that the cost associated with the preparation of an REA is therefore an indirect cost (e.g., bid and proposal or general and administrative), making such REA preparation costs not directly recoverable in the sum certain damages amount being requested in the REA. By similarly characterizing a claim as a proposal, contracting officers also believe that claim preparation and adjudication costs should comply with *FAR* Part 15 rules, and any association to the Contract Disputes Act (CDA)[1] is irrelevant. As hard as one may find this to be unconscionable behavior bordering on government contracting malpractice, it is going on today and becoming more prolific.

The stated purpose and scope of *FAR* Part 15 is to prescribe the policies and procedures governing competitive and noncompetitive negotiated *acquisitions* and to describe the *acquisition* processes and techniques that may be used to design competitive *acquisition* strategies suitable for the specific circumstances of the *acquisition*. In particular, this *FAR* section is prescriptive in terms of the form(s) to be used by bidders when preparing their proposals in response to a request. Noteworthy throughout *FAR* Part 15 is the repeated reference to the term "acquisition" and the process of "acquiring" goods and services.

Under government-awarded *contracts*, the government has the right to change the terms of the *contract* unilaterally. Most equitable adjustments are the result of the *contract* changes clause, which is governed by *FAR* Part 43, "Contract Modifications." This *FAR* section prescribes the policies and procedures for preparing and processing

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contract modifications for all types of *contracts* including construction and architect/engineer *contracts* but does not provide specific or detailed guidance as to prescribe the format to be followed for an REA.

In accordance with the change clauses, the contractor is entitled to a price adjustment if: 1) the contracting officer changes any aspect of the general scope of the contract; and 2) the change affects the cost and/or schedule of performing the work. There is a series of change clauses from which the contracting officer can choose based on the contract type (e.g., fixed-price, cost reimbursable, time and materials, etc.) and the type of work being performed (e.g., construction, services, etc.). The various change clauses have relatively the same purpose and use. Generally speaking, a change clause serves to provide the following:

- Flexibility for the government to order unilateral changes, use technological advances, and incorporate changes in government requirements;
- A means for the contractor to propose changes to the contract that will improve efficiency and quality;
- The contracting officer authority to add or subtract work within the general scope of the contract or to accelerate or decelerate the contract schedule without going through the process of a new procurement (i.e., acquisition) or using new funds; and
- A legal means by which the contractor can attain *equity* through the contract administrative dispute process.

The change clauses do not incorporate every change to the contract. Changes are limited to those that are within the general scope of the contract and the types of changes described by the clause. A change falls under the general scope of the contract if the total work performed is essentially the same work or end product as called for in the original contract.

When these changes impact the cost and/or schedule of performing the contract, an equitable adjustment may be used to ensure fair treatment to both parties; the contractor and the government. The underlying

legal theory focuses on the contractor being made "whole," such that the government does not receive undue enrichment. The government is also kept "whole" if the changes result in less cost or if the contractor can deliver earlier.

A contractor seeks an equitable adjustment by filing an REA. An equitable adjustment is a written request or assertion by one of the contracting parties seeking the payment of money, the adjustment or interpretation of contract terms, or other relief arising under or relating to the *contract*. The *FAR* change clauses do not prescribe a format to be used for REAs other than to state that the contractor must assert its right to an adjustment within 30 days from when it first was notified or became aware of the change by submitting to the contracting officer a written statement describing the general nature and amount.

Contract case law has established, however, that a properly prepared REA must contain sufficient detail to permit the contracting officer to be able to give meaningful, reasoned consideration to the request, the sufficiency of which is determinable on a case-by-case basis. As long as the contractor's assertion contains the minimum information necessary to inform the contracting officer of what is being requested and the grounds of the request, the contracting officer must act on the request and deny it if the information provided is insufficient to approve it. To meet this "sufficiency of information" requirement, an REA should contain at a minimum:

- A summary description of the cause and effect of the action;
- A basis of entitlement analysis, referencing the contract clause(s), *FAR* citations, and/or case law references;
- A technical analysis description (and chronology) of the cause and effect; and
- Support for the damages in terms of the sum certain amount of the request.

REAs can be filed before or after the contract modification occurs and can originate from the contractor or the government. An REA is normally resolved under the contract clause that provides for such relief.

Despite some recent opinions on the part of some procuring agency contracting officers, there is a clear distinction in the *FAR* with regard to what constitutes a proposal versus an REA; the former being associated with the *acquisition* process and the latter being associated with the performance and administration of a *contract*. Similarly, the *FAR* is prescriptive with regard to proposal format and content in response to an acquisition or procurement action, but such prescriptive guidance is not provided for REAs.

By misapplying the acquisition process (i.e., *FAR* Part 15) to the REA contract administration process (i.e., *FAR* Part 43), contracting officers have also gone one step further by declaring outside counsel and consultants costs unallowable as direct recoverable costs. Their logic (if you can call it "logic"), applied in this situation, makes the assumption that since an REA is the same as a proposal, then the costs associated with the preparation of the REA, including outside consultants and attorney's fees, are considered bid and proposal costs, and are therefore recoverable only as allocable, indirect general and administrative expense. Quite the opposite is in fact the truth.

REA preparation costs are considered normal costs of contract administration as a single cost objective (i.e., direct cost). FAR 31.205-33, "Professional and Consultant Service Costs," provides that costs of outside counsel and consultants are allowable costs of contract administration. This means that a contractor may recover attorney's fees and consultants costs incurred in the connection with the administration of the contract as part of an REA. The most significant restriction on allowability of REA preparation costs appears in FAR 31.205-47(f)(1). This *FAR* provision prohibits recovery of professional or consulting costs incurred in connection with prosecuting or defending a claim asserted by or against the federal government. Contracting officers often incorrectly cite this *FAR* provision in seeking to avoid the liability for contractors' attorney's fees and consulting costs incurred for the purpose of preparing, filing, and negotiating an REA.

There are a number of case law decisions that help define whether outside counsel fees and consultant costs are to be treated as allowable costs of contract administration or unallowable claim prosecution costs. In *Bill Strong Enterprises, Inc. v. Shannon*,[2] the decision states:

> If a contractor incurred the cost for the genuine purpose of materially furthering the negotiation process, such cost should normally be a contract administration cost allowable under FAR 31.205-33, even if negotiations eventually fails and a CDA claim is later submitted…. On the other hand, if a contractor's underlying purpose for incurring [attorney or consultants] costs is to promote the prosecution of a CDA claim against the government, then such costs are unallowable under FAR 31.205-33 and as prescribed under FAR 31.205-47(f)(1). Costs incurred in connection with the preparation and negotiation of a request for equitable adjustment before a CDA claim is filed or certified are "presumptively allowable."

With contracting officers taking a diametrically opposed stance (as compared to the *FAR*) on this cost allowability issue of REA preparation costs and seemingly treating contract administration costs as unallowable bid or proposal costs, they are taking a proactive approach to discouraging contractors from seeking expert advice and counsel in pursuit of equitable contract cost recovery by actively influencing contractors into believing that such costs are not recoverable. This tactic is most harmful to small businesses that typically would not have REA preparation expertise on staff and would be led to believe that these costs would have to come out of their profit. This ploy works to the contracting officer's advantage whereby he or she gains the upper hand of having in-house cost analysts and legal counsel at his or her disposal, while putting the small business at a distinct

disadvantage. This behavior is not only unconscionable, it is unethical and borders on malpractice when you consider the *FAR* is there to ensure fairness, equity, and good faith between the government and the contractor.

Another possible hypothesis for this aberrant contracting officer behavior may be the result of poor training and lack of sufficient knowledge transfer through attrition. As more seasoned contracting officers have retired, and administrative personnel were promoted to the ranks of warranted contracting officers in order to quickly fill the voids, these personnel have not received the thorough *FAR* training when it comes to the administration of contracts and the use of the proper associated regulatory citations in administering their duties.

This increasingly prevalent behavior raises yet another concern: What latent liability is the government creating for itself if what has been portrayed here has merit? While that is a possible topic for a future discussion, it certainly makes one think just how widespread might this behavior be and how large a liability could this be creating? Is this just the tip of the iceberg? Has the Titanic already set sail? Is it a time bomb waiting to explode?

Conclusion

Contractors large and small should not be intimidated by contracting officers trying to influence them into thinking that an REA, a proposal, and a claim are one and the same thing for the purpose of trying to disallow REA preparation costs in order to gain an unfair advantage in a contracting officer's pursuit of inequity. With the added value that outside counsel and subject matter expert consultants bring to the contract administration, modification, and dispute resolution processes, and as fully supported by the *FAR*, the decision as to how best to proceed should be a simple one. **CM**

ABOUT THE AUTHOR

BRUCE P. BOWLAND is executive vice president and director of Government Contractor Services for Gate 6 Solutions, Inc. He is an executive consultant practice leader in the areas of ERP system design, audit compliance, process development, and regulatory compliance.

J. MICHAEL FOLEY is president and CEO of Gate 6 Solutions, Inc. He is an executive consultant practice leader in risk analysis, change management, and dispute resolution.

Send comments about this article to cm@ncmahq.org.

ENDNOTES

1. *Public Law* 95-563, 92 Stat. 2383.
2. 49F.3d 1541, 1550 (Fed. Cir. 1995).