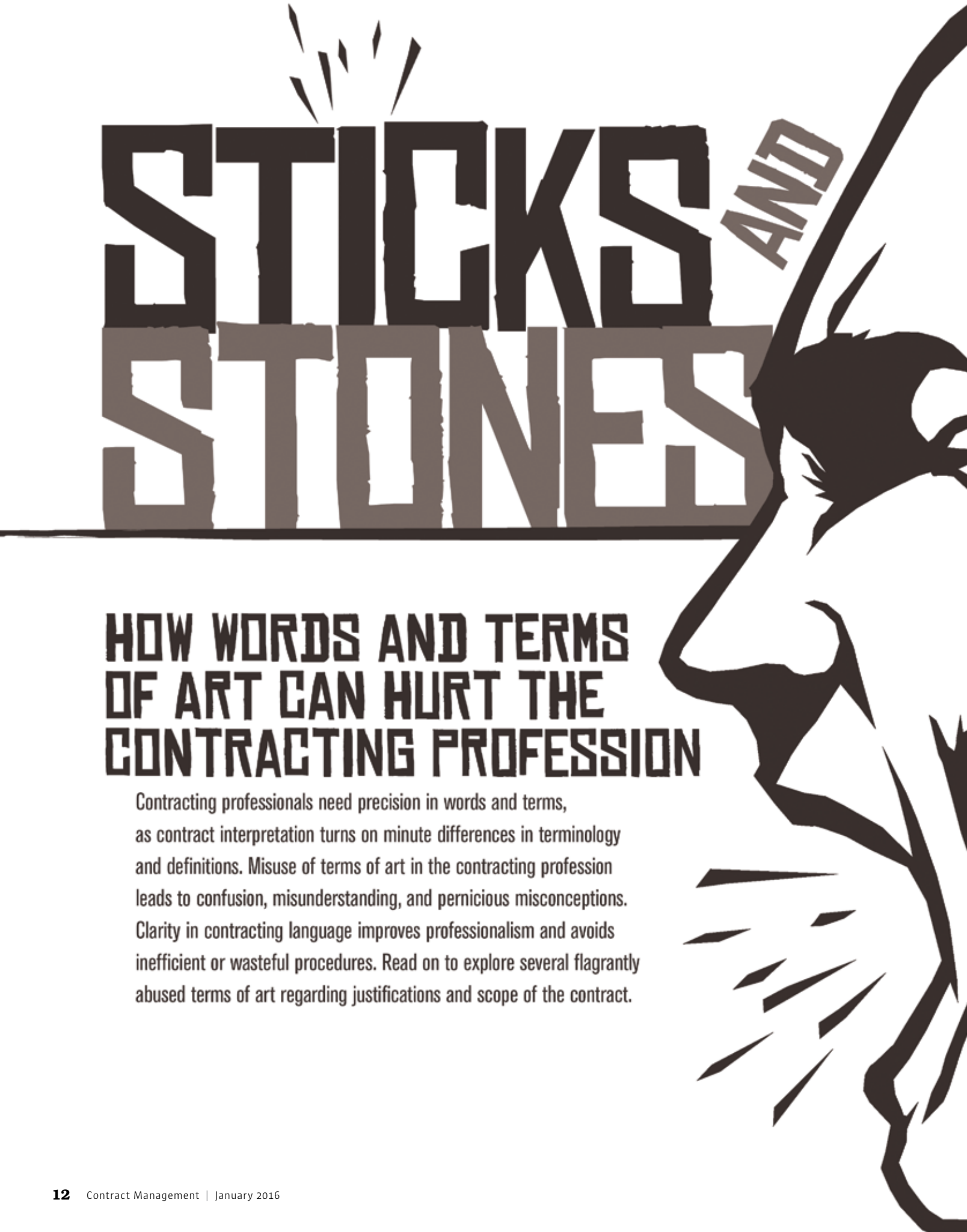
STICKS AND STONES



HOW WORDS AND TERMS OF ART CAN HURT THE CONTRACTING PROFESSION

Contracting professionals need precision in words and terms, as contract interpretation turns on minute differences in terminology and definitions. Misuse of terms of art in the contracting profession leads to confusion, misunderstanding, and pernicious misconceptions. Clarity in contracting language improves professionalism and avoids inefficient or wasteful procedures. Read on to explore several flagrantly abused terms of art regarding justifications and scope of the contract.

BY CHRISTOPH MLINARCHIK, JD, CFCM

THE IMPORTANCE OF PROFESSIONALISM IN CONTRACTING CANNOT BE UNDERSTATED.[1] THAT BEING SAID, A PERSISTENT THREAT TO THE PROFESSIONAL STATUS OF CONTRACTING IS THE MISUSE OF LANGUAGE. THE CONTRACTING PROFESSION DESPERATELY NEEDS MORE PRECISION IN CONTRACTING COMMUNICATION.

Words, terms of art, and definitions do not get the respect they deserve. People calling themselves contracting professionals blithely misuse them. Seasoned practitioners—who should know better—stay silent and allow bad habits to persist.

This article turns the spotlight on several frequently misused and abused terms of art, but it is not an exhaustive list. Every professional typically has a personal list of such terms, and does his or her best to set everyone straight. This article also focuses on justifications for exceptions to various competition standards and the misnomers surrounding modifications within or outside the scope of the contract.

MASTERY OF LANGUAGE

Mastery is something every professional strives to achieve. Mastery of words, terms of art, and definitions must be a major career goal for all contracting professionals. Anything less will stagnate professional growth, promote inaccuracy and errors, and sow confusion and disarray. Improper terms lead to improper processes. Mistakes that stand uncorrected lead to pernicious myths and poor professional habits.

Terms of art punctuate the contracting landscape, and it is impossible to navigate an acquisition without stumbling upon several. In fact, there are so many terms of art that outsiders accuse contracting professionals of "speaking in another language." Actually, there is some truth to that belief.

TERMS OF ART

To provide some preliminary clarity, a *term of art* is defined as "a term that has a specialized meaning in a particular field or profession."[2] This means that a term of art has a different meaning if used outside of the particular profession in which it derives its specific meaning. As a profession adopts and alters the meaning of words to suit a specialized meaning, these words become ensconced in the professional lexicon.

CASE STUDY: *CLAIM* AS A CONTRACTING TERM OF ART

One example of a contracting term of art is *claim*. Using the word *claim* in the context of the contracting profession invokes a limited, specific meaning of the word. Using the word *claim* in other contexts allows for a far broader range of definitions, including the following varied definitions (in the word's noun form) that are not specific to contracting:

- "A statement that something happened a certain way or will happen a certain way,"
- "A statement saying that something is true when some people may say it is not true,"
- "An official request for something (such as money) that is owed to you or that you believe is owed to you," or
- "A right to have something."[3]

This is one reason contracting professionals need to be careful when choosing to use the word *claim*. Words matter!

In the realm of U.S. federal government acquisition and contracting, a *claim* is a term of art defined as:

> [A] written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. However, a written demand or written assertion by the contractor seeking the payment of money exceeding $100,000 is not a claim under 41 U.S.C. chapter 71, Contract Disputes, until certified as required by the statute. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer, as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.[4]

In other words, in the context of it being a term of art in the contracting profession, a *claim* is a specific type of demand that begins the formal process of litigation envisioned by the Contract Disputes Act. This term of art distinguishes itself from other types of demands in the contracting profession (e.g., vouchers, invoices, or

routine requests for payment) that are not in dispute when submitted.[5] As you can see, there are extreme differences between the contracting term of art version of the word *claim* and the word's other various meanings outside of this context.

Given that *claim* is an important contracting term of art, it must not be misused. For example, contracting professionals should use extreme caution when describing contractor submissions. Never call a request for equitable adjustment (REA) a claim, never call a claim an REA, and never mix up vouchers and invoices with other demands for relief. Again, words matter!

Define Terms–Use a "Definitions" Section

Words and definitions are so important to the contracting profession that several treatises exist devoted solely to contracting words and terms of art. One such reference, which is particularly good, is *The Government Contract Reference Book: A Comprehensive Guide to the Language of Procurement*.[6]

Learning about words and terms of art is not limited to reading the definitions sections of the *Federal Acquisition Regulation* (*FAR*). The careful reader will note the use of the plural form of the word sections was not a typographical error. Indeed, there are several different sections for definitions in the *FAR*, not just the classic FAR 2.101. As an illustrative example, FAR Part 3, by itself, has 12 different sections dealing with definitions.[7] Definitions of words and terms are extremely important, and can make or break a contract.

Contracts make agreements explicit so that clearly defined rights and obligations can be easily referenced, understood, and enforced. One maxim of contract drafting is that terms should be clearly defined. Ambiguous terms or conditions have two or more reasonable interpretations. Ambiguity is the enemy of the contract scrivener, because it invites disagreement. The ideal, well-written contract has no ambiguity because there is only one way to interpret every term and condition. Writing conditions or clauses is the topic of another article, but the best way to control words

> "MASTERY OF WORDS, TERMS OF ART, AND DEFINITIONS MUST BE A MAJOR CAREER GOAL FOR ALL CONTRACTING PROFESSIONALS."

and terms of art is to simply define them, and to include a "Definitions" section in the contract in which to do so.

A "Definitions" section is the easiest way to prevent any possibility of ambiguity, alternative interpretation, or contract dispute over key words and terms of art. This simple step will not take much time, but can save weeks, months, or even years of litigation. Instead of wrangling over definitions and interpretations, then litigating the issue, then waiting months for a judicial resolution…why not use an ounce of prevention (i.e., defining important words, phrases, and terms of art in a "Definitions" section) instead of a pound of cure (i.e., disputes and litigation over misinterpretation of important words, phrases, and terms of art that were not clearly defined)? The end user, contractor, and government contracting team are all better situated if each important term of art is defined, explicitly, in a "Definitions" section.

IMPROPER USAGE: JUSTIFICATION FOR WHAT?

One source of mass confusion in the contracting profession is improper usage of terms of art—especially considering the panoply of justifications for using a lesser standard of competition, or not having competition at all. Neophytes and the uninformed call every single one of these justifications a "justification and approval" (J&A), which is shorthand itself for "justification for other than full and open competition" (JOFOC).[8] This is an egregious mistake because it leads to fundamental misunderstandings of the various methods of federal procurement. The other types of justifications, such as "limited sources justifications,"[9] are titled differently to signal their different competition requirements in different methods of procurement. Not every justification is a J&A! The contracting profession must purge itself of this improper use of language.

Competition Standards: The "Lane" of Procurement Determines the Type of Justification

Four common methods of procurement are found in FAR Parts 8, 13, 15, and 16:

- "Ordering Procedures for Federal Supply Schedules,"[10]
- "Simplified Acquisition Procedures,"[11]
- "Contracting by Negotiation,"[12] and
- "Orders Under Multiple-Award Contracts."[13]

We refer to these common methods of procurement as the four "lanes" of acquisition, each requiring different types of justifications for failing to meet their required levels of competition. The different names and formats for justifications reflect the different standards of competition in each "lane."

➢ Lane One: Traditional, Full and Open Competition Under FAR Part 15

Start with the most burdensome and comprehensive source of competition: full and open. The Competition in Contracting Act (CICA) mandates full and open competition,[14] and is the default competition standard unless there is some exception. CICA applies to FAR Part 15 procurements.[15] Not using full and open competition, or using full and open competition after the exclusion of sources (a.k.a., a "set-aside"),[16] requires a traditional J&A, which is otherwise known as a JOFOC.[17]

How does the contracting professional know that JOFOC is the proper name, as opposed to the shorthand—J&A? Because the *FAR* specifically requires that such a J&A be explicitly identified as such: "As a minimum, each justification…shall include…specific identification of the document as a 'Justification for other than full and open competition.'"[18]

As an aside, there are seven exceptions to full and open competition that every contracting professional should know by heart:

- Only one source,
- Urgency,
- Industrial mobilization,
- International agreement,
- Statute,
- National security, and
- Public interest.[19]

When rearranged in a different order than listed by statute and the *FAR*, the first letters of each of these exceptions form the mnemonic device "IOUSNIP" (pronounced "I owe you snip"). Now there is no excuse not to memorize the seven exceptions to full and open competition!

A special exemption to the default requirement for full and open competitive procedures is found in FAR Part 13, "Simplified Acquisition Procedures." Simplified acquisition procedures provide a statutory exemption to the requirement for full and open competition, which is implemented via regulation in FAR Part 13. As such, it is inappropriate to write a J&A when using simplified acquisition procedures.[20]

➢ Lane Two: Simplified Acquisitions

The competition requirement of simplified acquisition procedures is not full and open competition; it is instead "competition to the maximum extent practicable."[21] This is a different "lane" of procurement, and a different standard of competition from FAR Part 15. As such, to justify a lack of competition in the simplified acquisition procedures environment, the contracting officer need not comply with the competition requirements of FAR Part 6, because they do not apply.[22] Instead, the contracting officer need only briefly explain the decision in the file, while keeping "documentation to a minimum."[23]

FAR Subpart 13.5 provides for special authority to use simplified acquisition procedures for commercial supplies and services at or below a certain threshold, currently set at $7 million (and $13 million for contingency or emergency situations).[24] Restriction of the standard of competition using FAR Subpart 13.5 causes confusion, and is the source of persistent abuse of contracting language. Using FAR Subpart 13.5 procedures in a sole-source manner does not require the same document as the J&A (because a J&A concerns full and open competition, which is not the standard of competition under FAR Subpart 13.5). Limiting competition under FAR Part 13.5 to a single source requires a different document, which is a modified version of the traditional J&A required by FAR Part 6:

> Prepare sole source (including brand name) justifications using the format at 6.303-2, modified to reflect that the procedures in FAR Subpart 13.5 were used in accordance with 41 U.S.C. 1901 or the authority of 41 U.S.C. 1903.[25]

The observant contracting professional will notice that the statutory reference is modified from the CICA statute to the statutes dealing with simplified acquisition procedures. A major reason that justifications under FAR Subpart 13.5 are confused with traditional J&A's under FAR Parts 6 and 15 is that they both follow a similar format. The only way to intelligently understand their fundamental differences is to understand that they arise in different competitive environments. FAR Part 15 procurements, and requirements to write J&As under FAR Part 6, are enforcing CICA's mandate of "full and open competition."[26] Justifications

under FAR Subpart 13.5 are adhering to the requirement to "promote competition to the maximum extent practicable."[27]

What, then, should the thoughtful, knowledgeable contracting professional call this confusing justification under FAR Subpart 13.5? One suggestion could be to call it a "sole source justification using simplified acquisition procedures." In shorthand, they could simply be called "sole source justifications" (SSJ).

To summarize, failing to meet the standard of full and open competition under FAR Part 15 requires a J&A, failing to meet the standard of promoting competition to the maximum extent practicable under FAR Subpart 13.5 requires an SSJ. If the reader thinks this is academic nitpicking, please consider the fact that promoting competition is a fundamental duty of a government contracting professional,[28] and then decide whether it is better to be an *informed* professional or the alternative.

➢ Lane Three: Orders Against IDIQ Contracts

There are two other documentations for the failure to meet competition standards: those under FAR Part 8, and those under FAR 16.505(b). FAR Part 8 provides the procurement procedures for using General Services Administration (GSA) Schedule contracts. Before arriving at FAR Part 8, start with FAR 16.505(b), which provides ordering procedures for existing indefinite delivery/indefinite quantity (IDIQ) contracts.

First things first: After establishing an IDIQ contract, the contracting professional has already passed the hurdle of full and open competition. The IDIQ contract was likely established using the procedures of FAR Part 15 under full and open competition. Therefore, there is no need to satisfy the most complex and burdensome standard of full and open competition.

Instead, when placing task or delivery orders against existing IDIQ contracts, the contracting professional need only satisfy a lower standard of competition. This lower standard is called "fair opportunity."[29] For orders above the simplified acquisition threshold, the contracting professional must write a justification to use one of the exceptions to fair opportunity, found at FAR 16.505(b)(2). Again, this is not the traditional J&A, because it is not for a FAR Part 15 procurement, and because FAR Part 6 competition requirements do not apply to orders under FAR 16.505(b).[30] Instead, this document is called a "justification for an exception to fair opportunity," and this title is made authoritative by its usage in the *FAR* itself.[31]

To summarize so far: Justifications for exceptions to competition standards under FAR Subpart 13.5 are "sole source justifications" or SSJs. Under FAR 16.505(b) ordering procedures, they are "justifications for an exception to fair opportunity." Under FAR Part 15, they are "justifications for other than full and open competition," or JOFOCs or J&As. Why does the contracting professional care about these careful distinctions? Is it all just splitting hairs? No, because these distinctions reflect different standards of competition (i.e., maximum practicable extent, fair opportunity, and full and open). Therefore, these different standards of competition are absolutely critical to mastery of acquisition planning, source selection, procurement procedures, and professional advice to clients.

➢ Lane Four: Orders Against GSA Schedule Contracts

The last stop on the tour of different justifications for exceptions to competitive standards is found at FAR 8.405, "Ordering Procedures for Federal Supply Schedules." FAR Subpart 8.4 deals with GSA Schedule contracts. FAR Part 6 states that using the procedures established by the administrator of GSA satisfies full and open competition.[32] Therefore, properly using the procedures found in FAR Part 8 satisfies CICA's mandate.

However, restricting competition when using FAR Part 8 procedures does not require the use of a traditional J&A. Orders under GSA Schedules are exempt from the competition requirements of FAR Part 6.[33] Instead, a document restricting competition on a

GSA order is referred to as a "limited sources justification" (LSJ).[34] The LSJ has far fewer possible exceptions than the traditional J&A, which offers seven (remember, "IOUSNIP").[35] Instead, the LSJ for a GSA order has only three possibilities:

- Urgent and compelling need,
- Only one source available, or
- The work is a logical follow-on to a prior order placed on a sole-source or limited-sources basis.[36]

To summarize thus far, the prior discussion has explained the proper language to use when restricting competition across four major procurement processes, or "lanes":

- FAR Part 15 requires the traditional J&A, or JOFOC;
- FAR Subpart 13.5 requires the SSJ;
- FAR Part 16.505(b) requires the "justification for an exception to fair opportunity"; and
- FAR Part 8 requires the LSJ.

Armed with the knowledge of these proper terms of art, the contracting professional can explain them to colleagues in the context of their respective competitive requirements and procurement methods. No more calling everything a J&A! No more misapplying competitive standards to the wrong "lane" of procurement. No more wasting time by writing complex documents like a traditional J&A when only an LSJ is needed. No more sloppy terminology. No more abuse of the language of the contracting profession.

MISUSE AND ABUSE: SCOPE OF THE CONTRACT AND MODIFICATIONS

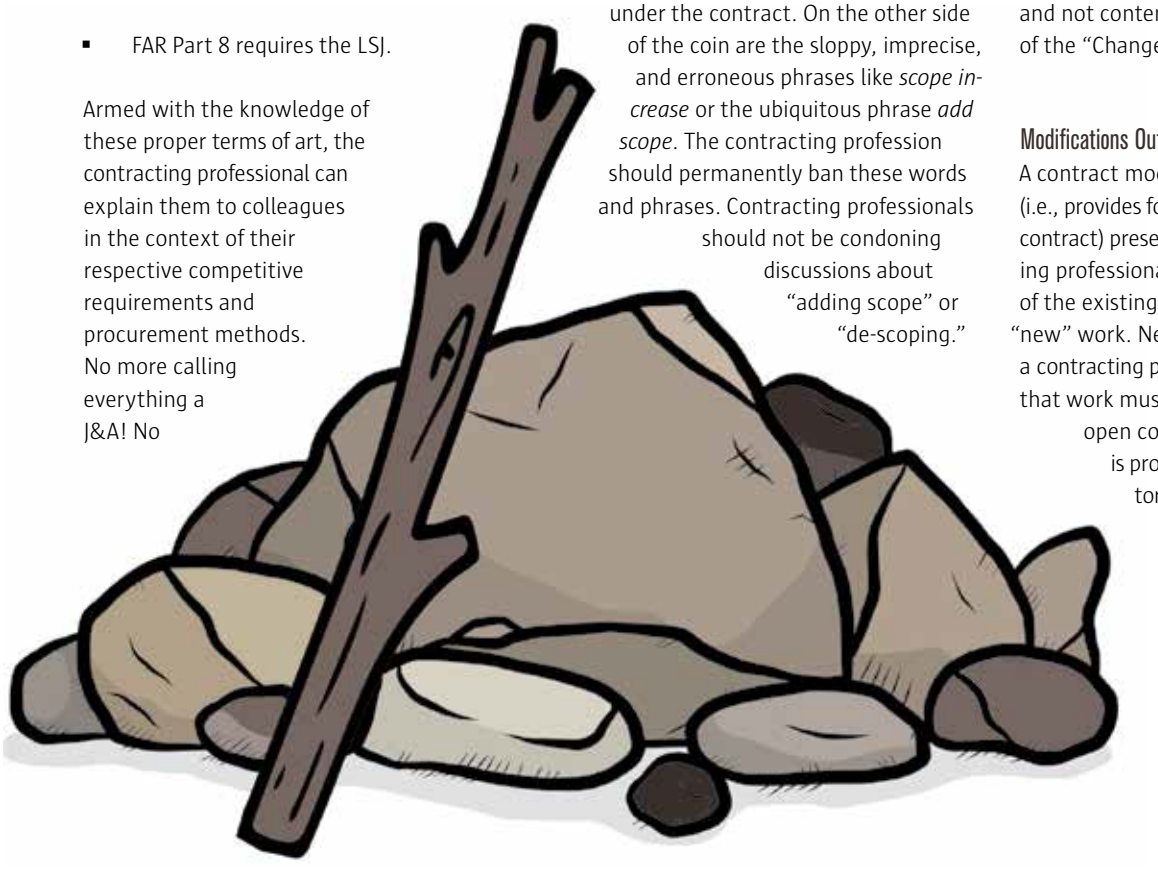
This article's last and final analysis of improper terminology in the contracting profession deals with another term of art—*scope* (or more specifically, the phrase *scope of the contract*). Contracting professionals are always questioning whether a modification falls within the scope of the contract. Pernicious and persistent abuse of the contracting language surrounds modifications that increase or decrease work.

The term *de-scope* is a sloppy, imprecise, and erroneous word that has no place in the contracting profession. Many practitioners use this word when they speak of a modification that reduces work to be performed under the contract. On the other side of the coin are the sloppy, imprecise, and erroneous phrases like *scope increase* or the ubiquitous phrase *add scope*. The contracting profession should permanently ban these words and phrases. Contracting professionals should not be condoning discussions about "adding scope" or "de-scoping." The concept of "scope" should instead be used to examine or describe the propriety of a contract modification as it relates to the boundaries of the scope of the contract. "This contract modification is out of scope" or "This contract modification is within scope" are two acceptable usages.

The scope of the contract is fixed at contract inception. *Scope of the contract* means "[a]ll work that was fairly and reasonably within the contemplation of the parties at the time the contract was made."[37] A key distinguishing feature of many government contracts is the "Changes" clause,[38] which allows unilateral changes by the contracting officer—as long as they are within the *scope of the contract*. Therefore, contract modifications should not (more accurately, *cannot*) "add scope." Contract modifications can only increase work within the confines of the scope of the contract as it exists! The scope of the contract is a preexisting limitation on the range of available modifications. Issuing a modification cannot properly expand the scope of the contract. If it did, such a modification would actually be adding new work that is outside the scope of the contract, and not contemplated by the inclusion of the "Changes" or other clause.

Modifications Outside the Scope of the Contract

A contract modification that "adds scope" (i.e., provides for work outside the scope of the contract) presents a problem to the contracting professional. Work outside the scope of the existing contract is, by implication, "new" work. New work must be competed. If a contracting professional procures new work, that work must be competed using full and open competition.[39] If the new work is provided to the existing contractor with no competition (i.e., via contract modification), that is effectively a sole-source procurement. Therefore, the sole-source procurement must be justified, as has been previously discussed (remember the "lane" of procurement and the proper competitive standard!).



Contracting professionals must digest and spread the knowledge that the scope of the contract cannot be properly increased by modification. Doing so necessarily violates competition requirements, and must be justified accordingly. The scope of the contract is fixed at contract inception, just as the scope of the competition is determined by the solicitation content and method. Modifications cannot "add scope." What, then, should the contracting professional call modifications that delete some (but not all) of the required work in the contract?

More Terms of Art: Deductive Changes and Partial Terminations

The proper terms of art for contract modifications that delete some but not all of the work from a contract are *deductive changes* or *partial terminations*, depending on the authority used to make the change. *Deductive changes* and *partial terminations* share the same result—they both decrease the work to be completed under the existing contract. They can also use the same process—the issuance of a unilateral modification from the government. The difference between these two terms of art is based upon the contractual authority used to issue the unilateral modification. If the unilateral modification rests upon the authority of the "Changes" clause, it is called a *deductive change*.[40] Using the "Termination for Convenience" clause means the modification is a *partial termination*.[41] (The "Termination for Convenience" clause can also be used for a full termination of the remaining work to be completed under the contract.) There is no such thing as a "de-scope"! Contracting professionals should understand and use the correct, precise, and accurate terms of art: *deductive change* and *partial termination*.

CONCLUSION: GIVE WORDS AND TERMS OF ART THE RESPECT THEY DESERVE

This article covers a subset of the myriad abuses of language in the contracting profession. It is the duty of every contracting professional to properly use words and terms of art, and to promote accuracy among their colleagues.

Debates run around in circles if two parties are talking past each other, due to their use of two different definitions for the same term, or failure to understand the importance of precise language. Sloppiness in language regarding justifications can lead to unnecessary documentation, wasteful procedures, or even the use of completely incorrect standards of competition. This can affect the very nature of the procurement process, which is the realm of expertise for the contracting professional.

As the old saying goes, sticks and stones can break bones, but (in the case of the contracting profession) words *can* hurt you! Guard, protect, and improve the status of the contracting profession by carefully using contracting language, and by studying the underlying reasons for the subtle distinctions in key terms of art. **CM**

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

ENDNOTES

1. *See* Christoph Mlinarchik, "Secrets of Superstar Contracting Professionals," *Contract Management* Magazine (May 2014); and Christoph Mlinarchik, "What's in a Name: REA Versus Claim," *Contract Management* Magazine (February 2014).
2. **www.merriam-webster.com/dictionary/term%20of%20art**.
3. *Derived from* **www.merriam-webster.com/dictionary/claim**.
4. *Federal Acquisition Regulation* (*FAR*) 2.101.
5. For more information, *see* Mlinarchik (February 2014), note 1.
6. Ralph C. Nash, Steve L. Schooner, Karen R. O'Brien-DeBakey, and Vernon J. Edwards; *The Government Contracts Reference Book*; third ed. (2007).
7. I.e., FAR 3.104-1, 3.302, 3.401, 3.501-1, 3.502-1, 3.702, 3.801, 3.901, 3.907-1, 3.908-2, 3.1001, and 3.1101.
8. *See* 41 U.S.C. 3304, 10 U.S.C. 2304(c), *and* FAR Subpart 6.3.
9. *See* FAR 8.405-6.
10. FAR 8.405.
11. FAR Part 13.
12. FAR Part 15.
13. FAR 16.505(b).
14. 10 U.S.C. 2304.
15. The CICA statute is implemented by regulation in FAR Part 6, "Competition Requirements," which applies to FAR Part 15 procurements. (FAR 6.001.)
16. *See* FAR Subpart 6.2.
17. *See* FAR 6.303-2(b)(1).
18. *Ibid.*
19. *See* FAR 6.302.
20. *See* 41 U.S.C. 1901.
21. FAR 13.104.
22. *See* FAR 6.001(a).
23. FAR 13.106-3(b).
24. FAR 13.500.
25. FAR 13.501(a)(1)(ii).
26. *As per* 10 U.S.C. 2304.
27. *As per* FAR 13.104.
28. *See* FAR 1.102(b)(1)(iii) *and* FAR 1.102-2(a)(5).
29. *See* FAR 16.505(b)(1).
30. *See* FAR 6.001.
31. FAR 16.505(b)(2)(ii) states: "The justification for an exception to fair opportunity shall be in writing…."
32. FAR 6.102(d)(3).
33. *See* FAR 8.405-6.
34. *Ibid.*
35. FAR 6.302.
36. FAR 8.405-6(a)(1)(i).
37. Nash, *et al.*, *see* note 6.
38. *See* FAR 43.201, 43.205, *and* 52.243-1–7.
39. *As per* 10 U.S.C. 2304.
40. *See* Nash, *et al.*, note 6, at 171.
41. *See* FAR 2.101 *and* Nash, *et al.*, note 6, at 419.