



# FEDERAL CONTRACTS



## REPORT

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### EXPANDED PROTESTS FOR TASK AND DELIVERY ORDER AWARDS

By JOSEPH J. PETRILLO AND SOPHIA ZETTERLUND

The National Defense Authorization Act for 2008 (the “Act”) greatly expands the ability to protest the award of task and delivery orders, for both civilian and military agencies.<sup>1</sup> The new authority goes into effect on May 27, 2008. This legislation is significant because until now the Federal Acquisition Streamlining Act (“FASA”) prohibited the protest of any task or delivery order “except for a protest on the ground

that the order increases the scope, period or maximum value of the contract under which the order is issued.” 10 U.S.C. § 2304c(d); 41 U.S.C. § 253j(d).<sup>2</sup>

Since the enactment of FASA in 1994, task and delivery order contracts have become a popular vehicle for Federal acquisitions. (They are sometimes referred to as “IDIQ” or “indefinite delivery, indefinite quantity” contracts). However, a number of audit reports and studies have criticized lax contracting practices in connection with the award of orders under these contracts, and especially the lack of effective competition.<sup>3</sup> The new rules are directed at multiple-award task and delivery order contracts, where the Government has the ability to choose among several contractors when it seeks to place an order for goods or services.

Although the new law does not restrict the grounds of a protest, it has some significant limitations:

- It only applies to task and delivery orders “valued” at over \$10 million; orders below that threshold are still subject to the FASA limitations.<sup>4</sup>

<sup>1</sup> Public Law 110-181, Jan. 28, 2008, section 843, “Enhanced Competition Requirements For Task And Delivery Order Contracts,” amending provisions in both Title 10 and Title 41, U.S. Code. The protest provisions read as follows:

(e) PROTESTS. – (1) A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for –

(A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or

(B) a protest of an order valued in excess of \$10,000,000.

(2) Notwithstanding section 3556 of title 31, United States Code, the Comptroller General of the United States shall have the exclusive jurisdiction of a protest authorized under paragraph (1)(B).

Sec. 843(a)(2)(defense contracts); Sec. 843(b)(2)(civilian agency contracts).

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<sup>2</sup> GAO case law also carved out an exception for “downs-elects,” which were order competitions that precluded the losers from future business under the contract. *Electro-Voice, Inc.*, B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23 at 5.

<sup>3</sup> See, e.g., DOD IG, B-2007-007 FY 2005 DoD Purchases Made Through the General Services Administration, (Oct. 30, 2006) (available at: [http://www.dodig.mil/A\\_audit/reports/FY07/07-007.pdf](http://www.dodig.mil/A_audit/reports/FY07/07-007.pdf)); U.S. GAO, *Guidance Needed to Promote Competition for Defense Task Orders*, GAO-04-874 (July 2004); U.S. GAO, *Civilian Agency Compliance with Revised Task and Delivery Order Regulations*, GAO-03-983 (Aug. 2003) (both available at: [www.gao.gov](http://www.gao.gov)).

<sup>4</sup> The Acquisition Advisory Panel had proposed a \$5 million threshold for protest rights. *Report of the Acquisition Advisory Panel*, 108 (Jan. 2007).

- The Comptroller General has exclusive jurisdiction over these protests; thus they can only be filed at the General Accounting Office (“GAO”).
- There is a sunset provision; the expanded protest rights will expire in three years, unless Congress acts to renew them. So this is something of an experiment.

Some statutory language is unclear or incomplete. One problem is how to apply the \$10 million threshold. Does it apply to the Government estimate of the procurement’s value, the amount of the awarded order, or the amount of the protester’s proposal? Perhaps there will be guidance on this topic when the provisions are implemented in the Federal Acquisition Regulation (“FAR”).

According to Eagle Eye Inc., orders in excess of \$10 million have been awarded at the rate of about 2,600 per year.<sup>5</sup> Characteristically, only a small percentage of procurements is protested. Thus, the increase in protests attributable to this provision will probably not be more than 200 per year.

This article explores the likely topics to be addressed in those protests. One promising area is the new set of rules for task order competitions set forth in the 2008 Authorization Act. Another source of potential protest issues is GAO case law developed for orders under the General Services Administration’s Federal Supply Schedule (“FSS” or “Schedule”).

### Enhanced Competition Requirements for Orders

The 2008 Authorization Act also imposes enhanced competition requirements that apply to the award of any task or delivery order valued at over \$5 million.<sup>6</sup> If any of these are violated, they could be the subject of a GAO protest. Such protests, of course, would only be possible if the orders in question were valued above \$10 million.<sup>7</sup>

There are five substantive rules in the Act; they prescribe, “at a minimum—

- (1) a notice of the planned task or delivery order that includes a clear statement of the agency’s requirements;
- (2) a reasonable period of time to provide a proposal in response to the notice;
- (3) disclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating such proposals, and their relative importance;
- (4) in the case of an award that is to be made on a best value basis, a written statement documenting the basis for the award and the relative importance of quality and price or cost factors; and
- (5) an opportunity for a post-award debriefing consistent with the requirements of 10 U.S.C.

<sup>5</sup> FY 2005: 2,279; FY 2006: 2,682; FY 2007 (data incomplete): 2,607. Interview with Paul Murphy, Eagle Eye Inc., Feb 26, 2008.

<sup>6</sup> Public Law 110-181, Jan. 28, 2008, Section 843.

<sup>7</sup> Orders exceeding \$5 million but under \$10 million would be subject to the same enhanced competition requirements, but contractors could not enforce these requirements through the protest process. At most, they could object to the agency’s ombudsman.

§ 2305(b)(5) (for defense contracts) or 41 U.S.C. § 253b(e) (for civilian contracts).<sup>8</sup>

It is likely that a failure to follow these requirements will provide potential protest grounds for task and delivery orders valued at over \$10 million. For instance, if the agency failed to document a best-value award decision adequately, a contractor could file a protest. Such a protest might allege that the agency departed from the stated award criteria, or it failed to accurately assess the differences between proposals, or that it did not explain the basis for award. Similarly, a protest might allege that the agency did not provide an adequate period to prepare a proposal, or that the notice did not have a clear statement of requirements.<sup>9</sup> Thus, the most obvious source of valid protest issues is the list of enhanced competition requirements for orders.

### GAO Protests of Federal Supply Schedule Orders

GAO has never applied the restrictions on task and delivery order protests to GSA’s FSS program.<sup>10</sup> Thus, a body of law has evolved concerning protestable issues in the ordering process. Indeed, since regulatory coverage of this process tends to be scanty, GAO decisions constitute a “common law” of FSS ordering. When it comes time to adjudicate task and delivery order protests, GAO is likely to look to this case law as guidance, and perhaps even precedent. A review of the common issues arising in such protests is instructive.

### Enforcing the Ground Rules

When an agency conducts a competition between or among Schedule contractors, GAO will enforce the ground rules set forth in the solicitation or equivalent document. In these situations, the procuring agency chooses “to use an approach that is more like a competition in a negotiated procurement than a simple FSS buy.” *CourtSmart Digital Systems, Inc.*, B-292995.2, Feb. 13, 2004, 2004 CPD ¶ 79, citing *COMARK Federal Systems*, B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34 at 4-5. In such cases, GAO reviews the evaluation and award to ensure that it was fair and equitable and consistent with the terms of the solicitation. *Id.* This line of decisions suggests strongly that GAO will enforce the enhanced competition rules of the Act, discussed above.

<sup>8</sup> Pub. L. 110-181, Sec. 843(a)(2)(defense contracts); Sec. 843(b)(2)(civilian contracts).

<sup>9</sup> By simply authorizing a “protest of an order,” the statute leaves some doubt about whether the terms of the notice can be protested. However, if “protest”, as used in the Act, has the same meaning as the same term in the statute governing GAO jurisdiction, then it would include an objection to a solicitation or other request for offers. See 31 U.S.C. § 3551(1).

<sup>10</sup> In one area, GAO already adjudicates task and delivery order protests which are similar to FSS protests. These are the protests of issues of “scope” which FASA permitted. *Relm Wireless Corp.*, B-298715, Dec. 4, 2006, 2006 CPD ¶ 190. Similarly, GAO has ruled on whether a particular order is within the scope of an FSS contract. See, e.g., *Tarheel Specialties, Inc.*, B-298197, July 17, 2006, 2006 CPD ¶ 140 (sustaining protest where labor categories included in awardee’s offer were not included in the awardee’s applicable FSS contract); *CourtSmart Digital Systems, Inc.*, B-292995.2, Feb. 13, 2004, 2004 CPD ¶ 79 (sustaining protest where offeror proposed item that was not on its FSS schedule nor the current schedule of its teaming partner); *Simplicity Corp.*, B-291902, April 29, 2003, 2003 CPD ¶ 89 (labor categories included in a vendor’s quotation must be listed on the vendor’s schedule contract before an order is issued.).

Other cases show the type of issues that arise in this context.

### Equal Treatment of Offerors

GAO will also sustain a protest where the agency fails to evaluate the offerors on an equal basis. *Simplicity Corp.*, B-291902, April 29, 2003, 2003 CPD ¶ 89. In that case, GAO sustained a protest where costs required by the solicitation were included in protester's proposal, but were not fully included in the awardee's proposal, and thus the agency's evaluation was an improper "apples to oranges" comparison. Also, in *CourtSmart Digital Systems, Inc.*, *supra*, GAO upheld a protest where the agency only partially tested the awardee's system for compliance with accessibility standards for the disabled and found it failed to meet the standards, yet did not evaluate the protester's system for accessibility compliance even though the system would have met the standards. By ordering the non-compliant system, the agency essentially waived a mandatory solicitation criterion of accessibility. If GAO extends this line of cases to task and delivery orders, then a protester may contend that its proposal was evaluated differently than the awardee's.

### Substantive Evaluation Issues

In the FSS arena, GAO "will review the agency's actions to ensure that the evaluation was fair and reasonable and consistent with the solicitation." *KMR, LLC*, B-292860, Dec. 22, 2003, 2003 CPD ¶ 233. There, the solicitation promised to evaluate "relevant" past experience, defined as the same or similar work, but the record did not show why past experience evaluated for the awardee met this definition.

GAO will also entertain protests of FSS orders alleging that the proposed items were unreasonably disqualified as unacceptable. In *CourtSmart Digital Systems, Inc.*, B-292995.2, Feb. 13, 2004, 2004 CPD ¶ 79. GAO reviewed the record and determined that the protester's software met a reasonable interpretation of the solicitation's requirements in the Statement of Work. Accordingly, it sustained a protest against the agency's determination that the software was unacceptable. In deciding this protest, GAO announced that a solicitation under the FSS program must be read as a whole and in a reasonable manner, giving effect to all its provisions, which is the same test applied to solicitations under FAR Parts 14 (sealed bidding) and 15 (competitive proposals).

Other protest decisions involving substantive evaluation issues in the context of FSS orders have addressed flaws in areas such as the identification and mitigation of organizational conflicts of interest. *Alion Science & Technology Corp.*, B-297342, Jan. 9, 2006, 2006 CPD ¶ 1. There, GAO determined that the agency's conclusions that potential organizational conflicts of interest were minimal and could be addressed by using a subcontractor were not supported by the record. And in *Crestridge, Inc.*, B-295424, Feb. 23, 2005, 2005 CPD ¶ 39, GAO reviewed the agency's decision to penalize the protester's proposal as "too general." GAO's own review showed it was more detailed than the awardee's proposal in certain areas, and in other areas both proposals had the same degree of specificity. The protest was sustained. Thus, the evaluation of FSS orders must be reasonably supported by the record, and GAO will probably apply this same principle to task and delivery orders in the future.

### Unsupported or Improper Source Selection Decision

GAO has sustained protests where the FSS award decision was inconsistent with the evaluation criteria set forth in the solicitation. For instance, in *GlassLock, Inc.*, B-299931, Oct. 10, 2007, 2007 WL 4200104, the solicitation announced that technical factors would be considered more important than price. GAO ruled that the agency had improperly made its award decision on the basis of the lowest-priced, technically acceptable proposal. We expect GAO to enforce the Act's requirement for the disclosure of evaluation factors and subfactors, and their relative importance, by sustaining protests when the award decision deviates from the announced criteria.

Similarly, GAO will overturn an award where the agency's conclusions are not reasonably based or are undocumented in the record. In *OSI Collection Services, Inc.*, B-286597, Jan. 17, 2001, 2001 CPD ¶ 18, the agency relied on an overly mechanical mathematical analysis of past performance, which did not support the conclusions reached in the award documentation. That, and a lack of qualitative analysis, doomed the source selection.

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### Irregularities in Discussions

When competing FSS orders, agencies do not have to conduct discussions with offerors, and the Act does not require this for task and delivery orders, either. When an agency does conduct such discussions in the FSS context, however, it is subject to certain ground rules found in GAO decisions.

These rules have some latitude. For instance, some GAO cases hold that an agency is not required, for example, to engage in "equal discussions;" rather it may solicit information from only one vendor – without affording another FSS vendor a similar opportunity – to clarify the terms of that vendor's FSS contract. *Vion Corp.*, B-283804.2, Jan. 24, 2000, 2000 CPD ¶ 22; *Intelligent Decisions, Inc.*, B-274626, B-274626.2, Dec. 23, 1996, 97-1 CPD ¶ 19.

On the other hand, other GAO cases hold that the agency must make an offeror aware of perceived weaknesses or deficiencies in the proposal, and cannot engage in discussions that are not equitable *TDS, Inc.*, B-292674, Nov. 12, 2003, 2003 CPD ¶ 204. In that case, GAO sustained a protest against an FSS order where other offerors received questions that were far more detailed than those received by the protester, and where those questions related far more specifically to the agency's concerns about their quotes. Similarly, in *ACS Government Solutions Group, Inc.*, B-282098, June 2, 1999, 99-1 CPD ¶ 106, an FSS order ran into trouble where discussions did not alert the protester to the evaluation panel's concern as to the size of the price increase after the first year. GAO should apply a similar standard to discussions during the competition for task or delivery orders.

**Conclusion**

Given its track record with FSS procurements, it would be surprising if GAO refused to decide protests alleging that an agency had failed to follow the enhanced competition rules in the Act for task and delivery order contracts. Beyond that, GAO is likely to apply the same rules to task and delivery ordering as it does to FSS ordering.

GAO's decisions in FSS protests show that as the competitive process for orders becomes more formal, it

is subject to stricter scrutiny and firmer standards. For instance, even though the regulations in FAR Part 15 do not apply to FSS protests, GAO applies the same standards it uses for competitive proposals when the ordering procedures appear to be comparable. *TDS, Inc.*, *supra*, at n. 3, citing *Uniband, Inc.*, B-289305, Feb. 8, 2002, 2002 CPD ¶ 51. If GAO applies these rules to task and delivery orders, then the ordering process will become more regular and transparent as a result.