Current Problems with Multiple Award Indefinite Delivery/Indefinite Quantity Contracts: A Primer

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Much of the Department of Defense (DOD) spending is on service contracts through task orders issued under multiple-award contracts, allowing for a streamlined, flexible acquisition process.[1] This primer discusses the fundamentals of multiple award indefinite delivery/indefinite quantity (ID/IQ) contracting and current problems associated with the multiple award ID/IQ system. The article focuses specifically on problems in the area of competition, including the lack of fair opportunity to compete, out of scope orders, lack of adequate supervision, and other miscellaneous problems with the multiple award ID/IQ system. The first section discusses the basic terminology and legal requirements of the multiple award ID/IQ system. The second section deals with additional legal requirements resulting from congressional modifications designed to strengthen and encourage competition within the multiple award system. The third section outlines problems in multiple award ID/IQ contracting. Multiple award ID/IQ contracting has become an increasingly important focus area for the U.S. Army and is a challenging area for acquisition professionals.[2]

I. Definitions

Multiple award ID/IQ contracts (also called "task and delivery order contracts"[3]) are open-ended contracts. Instead of creating a contract for a definite amount of goods or services, the government announces that it will have certain needs in the future. Contractors respond with information regarding their ability to meet those needs. Thereafter, the government awards several contractors the opportunity to sell those goods and services to the government in the future. When the contract is created, the government agency does not have to order any goods or services immediately. Rather, the agency can place orders as the agency's needs arise.

A. Task and Delivery Orders

Task and delivery order contracts are contracts for either services (task) or for supplies (delivery) that do not specify a firm quantity.[4] The *Federal Acquisition Regulation* (*FAR*)[5] defines "task order contract"[6] and "delivery order contract"[7] in subpart 16.5.[8] Task and delivery order contracts can take the form of either requirements contracts or indefinite quantity

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> The Department of Defense (DOD) spends billions of dollars each year for services—ranging from the maintenance of military installations to managing information systems. Much of this spending is through task orders issued under multiple-award contracts or the General Services Administration's (GSA) federal supply schedule program. These contract vehicles permit federal agencies to acquire services in a streamlined manner, but both require ordering agencies to follow procedures designed to promote competition for individual orders.

GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-04-874, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, at 1 (July 2004) (internal citations omitted), *available at* http://www.gao.gov/new.items/d04874.pdf [hereinafter *Guidance Needed*].

2 Ralph C. Nash & John Cibinic, *Competition for Task Orders: the Exception or the Rule?*, 18 NASH & CIBINIC REP. ¶ 42 (Oct. 2004).

3 The terms "indefinite delivery/indefinite quantity contracts" and "task and delivery order contracts" refer to the same types of contracts—a base contract describing the goods or services, followed by later ordering of goods or services. Task and delivery order contracts could technically also take the form of requirements contracts. This paper uses the terms synonymously. *See generally* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 16 (July 2004) [hereinafter FAR].

4 *Id.* subpt. 16.501-1; *see also* RALPH C. NASH & JOHN CIBINIC, FORMATION OF GOVERNMENT CONTRACTS 308 (3d ed. 1998).

5 The *FAR* is codified at 48 C.F.R and is available at http://www.arnet.gov/far/.

6 FAR, *supra* note 3, subpt. 16.501-1 ("'Task order contract' means a contract for services that does not procure or specify a firm quantity of services . . . and that provides for the issuance of orders for the performance of tasks during the period of the contract.").

7 *Id.* subpt. 16.501-1("'Delivery order contract' means a contract for supplies that does not procure or specify a firm quantity of supplies . . . and that provides for the issuance of orders for the delivery of supplies during the period of the contract.").

8 *Id.* subpt. 16.501-1.

contracts.[9] Once the government awards an ID/IQ contract, the contracting officer can place orders in varying amounts and at varying times without additional procurement notices and without "full and open"[10] competition.[11] The government, however, must give each awardee or contractor a "fair opportunity to be considered" [12] for each order unless an exception applies. Subpart 16.505(b)(2) of the *FAR* lists four statutory exceptions to the fair opportunity requirement.[13] Those exceptions are discussed further in section IV.

Once the government has awarded the base contract, a government agency can place a specific task or delivery order whenever requirements arise. The task order or delivery order is for the specific goods or services (detailed specifics are found in the order, but the order must conform to the base contract descriptions).[14] Thus, the government can obtain needed goods or services without creating a new contract each time. Although the government is not required to hold a formal competition procedure for each order, contracting officers should consider[15] (i.e., think about and give "fair opportunity to be considered" to[16]) each awardee under a multiple award contract before deciding to place an order with any one specific contractor.[17]

B. Statement of Work

The statement of work describes the types of goods or services that the government wants the contract to cover.[18] Each service or supply ordered must be of the type specified in the original contract.[19] "A task or delivery order may not 'increase the scope, period or maximum value' of the contract. Such increases may only be accomplished 'by modification of the contract.'"[20] If the requirement is for services or supplies that the original ID/IQ contract did not envision, the agency should procure the requirement anew[21] using regular procurement methods to create a new contract, instead of placing an order

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[9] *Id.* subpt. 16.501-2; *see also* NASH & CIBINIC, *supra* note 4, at 308. In a requirements contract, the government agrees to order all of its needs from a vendor for a period of time. In an indefinite quantity contract, the government specifies a minimum and a maximum order amount but cannot identify exact quantities until a later date.

[10] The normal standard of competition for government contracting is "full and open."

> (a) 10 U.S.C. 2304 and 41 U.S.C. 253 require, with certain limited exceptions (see Subparts 6.2 and 6.3), that contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts.
>
> (b) Contracting officers shall provide for full and open competition through use of the competitive procedure(s) contained in this subpart that are best suited to the circumstances of the contract action and consistent with the need to fulfill the Government's requirements efficiently (10 U.S.C. 2304 and 41 U.S.C. 253).

FAR, *supra* note 3, subpt. 6.101.

[11] NASH & CIBINIC, *supra* note 4, at 308.

[12] FAR, *supra* note 3, subpt. 16.505(b).

[13] *Id.* subpt. 16.505(b)(2).

[14] The question of whether the goods or services ordered are within the contract is a question of fact. The *FAR* says that the base contract must have a description (statement of work) and that orders must be within the scope of the statement of work. *Id.* subpt. 16-504(a)(4)(iii) and 16-505(a)(2).

[15] The word "considered" is in the statute and does not have any connection to the legal term of "consideration" as used in contract law generally. *See* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 804(b)(2)(B), 113 Stat. 512 (2000); FAR, *supra* note 3, subpt. 16.505(b)(1).

[16] Contracting officers would be well advised to document the basis for choosing an awardee and to document that the other awardees were considered. This area is receiving increasing scrutiny. *See* Nash & Cibinic, *supra* note 2; *Guidance Needed supra* note 1, at 3-4.

[17] National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 803(b)(2)(B), 115 Stat. 1012 (2002) (requiring orders to be made on a "competitive basis"); National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 804(b)(2)(B), 113 Stat. 512 (2000) ("fair opportunity to be considered").

[18] 10 U.S.C.S. § 2304a(b)(3) (LEXIS 2006); 41 U.S.C.S. § 253h(b)(3) (LEXIS 2006).

[19] *See* FAR, *supra* note 3, subpt. 16.505(a)(2).

> Individual orders shall clearly describe all services to be performed or supplies to be delivered so the full cost or price for the performance of the work can be established when the order is placed. Orders shall be within the scope, issued within the period of performance, and be within the maximum value of the contract.

Id.

[20] NASH & CIBINIC, *supra* note 4, at 308 (quoting 10 U.S.C.S. § 2304a(e) and 41 U.S.C.S. § 253h(e)).

[21] *Id.*

under the ID/IQ contract.[22] The Federal Acquisition Streamlining Act of 1994 (FASA)[23] specifically permits contracts using "[a] statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract."[24] Accordingly, a statement of work can potentially cover a "broad spectrum" of supplies or tasks depending on how the statement is drafted.[25] A broad statement of work offers the government agency the advantage of flexibility[26] but also may cause a host of potential problems in contract administration.[27]

C. Indefinite Delivery/Indefinite Quantity

Variable quantity contracts can take the form of requirements contracts or ID/IQ contracts.[28] In an ID/IQ contract, the government does not know (or does not want to commit to) exactly how many items it needs or when exactly the items are needed. This uncertainty causes the government to only agree to purchase a minimum amount of goods or services from the contractor.[29] Subpart 16.504(a) of the *FAR* describes indefinite quantity contracts as contracts for an unspecified amount "of supplies or services during a fixed period."[30] The indefinite quantity contract does not specify the exact amount of goods and services to be ordered, but the contract will state a minimum and maximum order amount,[31] expressed as either the number of units or the dollar value.[32] The minimum quantity identified in the contract can be any amount, but should be "more than nominal" for the contract to be legally binding.[33] To establish a reasonable maximum quantity prior to contract formation, contracting officers should evaluate the current market using market research, user surveys, timely contracting trends, experience, and any other relevant information.[34]

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[22] In that case, the government needs to create a new contract instead of placing an order under the existing contract. An interesting practice is to draft broad statements of work. If the contracting officer drafts a statement of work covering many types of goods and services, the contract becomes more flexible allowing the government to order under the existing contract.

[23] Pub. L. No. 103-355, 108 Stat. 3243 (1994).

[24] NASH & CIBINIC, *supra* note 4, at 309 (quoting 10 U.S.C.S. § 2304a(b)(3) and 41 U.S.C.S. § 253h(b)(3)).

[25] *Id.* at 308.

[26] The flexibility is an advantage to the government in ordering goods or services. If desired goods or services are not within the scope of the statement of work, a new contract has to be created. If the goods or services are reasonably related to the scope of the statement of work, the government agency orders the goods or services simply and quickly under the existing ID/IQ contract. *See, e.g.*, Anteon Corp., Comp Gen. B-293523;B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51 (agency could not order needed supplies and services since the order was not within the scope of the statement of work); Computers Universal, Inc., Comp. Gen. B-293548, Apr. 9, 2004, 2004 CPD ¶ 78 (stating that the GAO upheld government's two page statement of objectives as a broad, generalized statement of work, so agency could order services that were not specifically described in statement of work).

[27] *See, e.g.*, Steven L. Schooner, Iraq Contracting: Predictable Lessons Learned, Statement of Professor Steven L. Schooner before the United States Senate Democratic Policy Committee (Sept. 10, 2004) (transcript available at the George Washington University Law School) ("The worst-case scenario arises where the a[sic] contractor performs work under an open-ended contract (e.g., with a vague or ambiguous statement of work) without guidance or management from a responsible government official (e.g., in the absence of an administrative contracting officer or contracting officer's representative).").

[28] FAR, *supra* note 3, subpt. 16.501-2. Subpart 16.501-2 also discusses definite quantity contracts, which are similar to ID/IQ contracts except that the quantity of supplies or services is specified. *See id.*

[29] *Id.* subpt. 16.501-2(b)(3); *see also* NASH & CIBINIC, *supra* note 4, at 1238.

[30] Even though the amounts and delivery times are indefinite, the ID/IQ contract must have a definite duration. FAR, *supra* note 3, subpt. 16.504 (a)(4) ("A solicitation and contract for an indefinite quantity must—(i) Specify the period of the contract, including the number of options and the period for which the Government may extend the contract under each option"). Subpart 16.504(a)(4) suggests that the contract should be written as base year contracts with options or as a stated minimum followed by additional quantities subject to the availability of appropriated funds. NASH & CIBINIC, *supra* note 4, at 1245. When using a base year with options, apply *FAR* cls. 52.217-6 (Option for Increased Quantity), 52.217-8 (Option to Extend Services), or 52.217-9 (Option to Extend the Term of the Contract). NASH & CIBINIC, *supra* note 4, at 1246. If the contract is for longer than a year, then apply *FAR* clause 52.216-18 with specific dates that indicate the last date for issuing orders under the contract. NASH & CIBINIC, *supra* note 4, at 1246-47.

[31] FAR, *supra* note 3, subpts. 16.504(a)(1), 16.504(a)(3).

[32] *Id.* subpt. 16.504(a) ("Quantity limits may be stated as number of units or as dollar values.").

[33] *Id.* subpt. 16.504(a)(2) ("To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity . . .").

[34] *Id.* subpt. 16.504(a)(1) ("The contracting officer should establish a reasonable maximum quantity based on market research, trends on recent contracts for similar supplies or services, survey of potential users, or any other rational basis.").

The government does not have to place any order for goods and services at the time of contract award. As long as the agency obligates itself to a "more than nominal"[35] minimum amount[36] the contract is binding.[37] The *FAR* only directs that the minimum amount be specific[38] and "fairly certain to order."[39] The way the ID/IQ system is set up, government contracting officers may use a low minimum to avoid potential government liability in the event the government's needs turn out to be lower than estimated. The only theoretical advantage to stating a higher minimum amount is that the government might benefit in the form of lower prices since the contractor could potentially offer lower prices if the government were willing to guarantee it will order a larger quantity.[40] This theoretical advantage, however, is somewhat negated in multiple award contracting. In the multiple award system, the government creates competition between awardees when ordering over time, so that the ordering process and competition between awardees should control prices to a greater degree.[41] In reality, government agencies have not been taking advantage of competition to reduce prices, but instead, as discussed in section IV, agencies have been using the flexibility of the multiple award ID/IQ system to obtain their needs quickly, with little competition.[42]

D. Multiple Award

Instead of awarding an ID/IQ contract to only one source, an agency can (and should)[43] award to multiple vendors, giving the government more flexibility and substantial benefits.[44] Indeed, the *FAR* incorporates the statutory preference for multiple award task order and delivery order contracts[45] at *FAR* 16.504(c).[46]

The advent of the multiple award system was the FASA.[47] Since FASA's enactment in 1994, multiple award task and delivery orders have become more attractive and hence more popular.[48]

> There has been an explosion in multiple award task and delivery order transactions since the enactment of task and delivery order contracting authority under the Federal Acquisition Streamlining Act of 1994. FASA gave broad authority to the agencies to use task and delivery order contracts and made them very attractive - permitting award on the basis of general work statements, not requiring procurement notices or new solicitations for awards of orders, and exempting orders from protests.[49]

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[35] *Id.* subpt. 16.504(a)(2).

[36] *See* NASH & CIBINIC, *supra* note 4, at 1238-39 (discussing adequate minimum amounts).

[37] *Id.* at 1244.

[38] FAR, *supra* note 3, subpt. 16.504(a)(1) ("The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services.").

[39] *Id.* subpt. 16.504(a)(2).

[40] NASH & CIBINIC, *supra* note 4, at 1244-45.

[41] *Id.* at 1245 ("Although higher minimum quantities may result in short-term price benefits, in the long run, contractors will offer competitive prices so that the government will order from them under the contract; so price will necessarily reflect such competition, negating some of the disadvantages of using low minimum quantities.").

[42] *See, e.g.*, Computers Universal, Inc., Comp. Gen. B-293548, Apr. 9, 2004, 2004 CPD ¶ 78; *Guidance Needed*, *supra* note 1, at 1 and 17; GEN. ACCT. OFF., REP. NO. GAO-04-605, *Rebuilding Iraq: Fiscal Year 2003 Contract Award Procedures and Management Challenges*, at 4-5 and 11-12 (June 2004), *available at* http://www.gao.gov/new.items/d04605.pdf [hereinafter *Rebuilding Iraq*].

[43] There is a statutory preference for using multiple award contracts. *See* FAR, *supra* note 3, subpt. 16.504(c).

[44] NASH & CIBINIC, *supra* note 4, at 1243.

[45] *Id*. at 1242.

[46] FAR, *supra* note 3, subpt. 16.504(c)(1)(i) ("[T]he contracting officer must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources.").

[47] Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994).

[48] Ralph C. Nash & John Cibinic, *Task and Delivery Order Contracting: Great Concept, Poor Implementation*, 12 NASH & CIBINIC REP. ¶ 30 (May 1998).

[49] *Id*.

The intent of FASA was to make task and delivery order contracting more efficient, while recognizing that the process could be abused to avoid competition.[50] "But efficiency has its costs" and may come at the expense of competition.[51] "In the world of [multiple award contracting] ordering, competition is the exception rather than the rule."[52] Nevertheless, multiple award contracting is the statutory preference, and government agencies take full advantage of this flexible procurement vehicle.[53]

To use this method, the contracting officer first has to decide if multiple awards are appropriate.[54] The *FAR* instructs contracting officers to avoid situations where only one awardee is able to perform under the contract or only one awardee has the required expertise.[55] To figure out how many contractors should be given an award under a multiple award contract, contracting officers must consider the following: the scope and complexity of the requirement,[56] the expected duration and ordering frequency,[57] the contractor's mix of resources,[58] and the agency's ability to maintain competition among awardees.[59]

Multiple awards are not appropriate in all cases. The *FAR* states that the multiple award approach is not appropriate if:

> (1) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;
>
> (2) Based on the contracting officer's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;
>
> (3) The expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards;
>
> (4) The projected task orders are so integrally related that only a single contractor can reasonably perform the work;
>
> (5) The total estimated value of the contract is less than the simplified acquisition threshold; or
>
> (6) Multiple awards would not be in the best interests of the Government.[60]

Even though the *FAR* gives statutory reasons for not using the multiple award system, contracting officers have considerable discretion within the *FAR* criteria.[61] Ideally, the multiple award system should provide substantial benefits: an agency using the multiple award system has better control over prices of individual task and delivery orders due to continuous competition between vendors; an agency can compare performance of the contractors before placing further orders; and an agency can place different orders with contractors of varying skill, giving the agency "access to a broader range of competence than would be possible with only a single contract."[62] Theoretically, government agencies should be attracted to the multiple award system's greater speed and flexibility. If those incentives were not reason enough, government agencies should use multiple awards whenever possible since Congress has mandated maximum use of the multiple award system.[63]

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[50] S. REP. NO. 258 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 2561, 2576.

[51] Michael J. Benjamin, *Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies*, 31 PUB. CONT. L.J. NO. 3, 429, 452 (2002).

[52] *Id*. at 453-54.

[53] *See, e.g.*, *Guidance Needed*, *supra* note 1, at 1 ("The Department of Defense (DOD) spends billions of dollars each year for services—ranging from the maintenance of military installations to managing information systems. Much of this spending is through task orders issued under multiple-award contracts. . . .").

[54] FAR, *supra* note 3, subpt. 16.504(c)(1)(ii)(A).

[55] *Id.* subpt. 16.504(c)(1)(ii)(A).

[56] *Id.* subpt. 16.504(c)(1)(ii)(A)(1).

[57] *Id.* subpt. 16.504(c)(1)(ii)(A)(2).

[58] *Id.* subpt. 16.504(c)(1)(ii)(A)(3).

[59] *Id.* subpt. 16.504(c)(1)(ii)(A)(4).

[60] *Id.* subpt. 16.504(c)(1)(ii)(B).

[61] NASH & CIBINIC, *supra* note 4, at 1243.

[62] *Id.* at 1244.

[63] FAR, *supra* note 3, subpt. 16.504(c).

E. Fair Opportunity to be Considered

Congress provided additional guidance on the use of task order and deliver order contracts in section 804 of the National Defense Authorization Act for Fiscal Year 2000.[64] More specifically, the Act required changes to the *FAR*[65] "to ensure that all contractors are afforded a fair opportunity to be considered for the award of task orders and delivery orders"[66] and to ensure each task order or delivery order had a statement of work "that clearly specifies all tasks to be performed or property to be delivered under the order."[67] The fair opportunity requirement is found in the *FAR* at subpart 16.505(b)(1)[68] and the exceptions to the fair opportunity requirement are found at *FAR* subpart 16.505(b)(2).[69] The specific statement of work requirement is found in the *FAR* at subpart 16.505(a)(2).[70]

F. Competitive Basis

In 2002, Congress further changed Department of Defense (DOD) procurement in the National Defense Authorization Act for Fiscal Year 2002.[71] Congress specifically addressed competition with a DOD requirement that "each individual purchase of services in excess of $100,000 that is made under a multiple award contract shall be made on a competitive basis . . ."[72] Section 803 further defined "competitive basis" to mean purchases made under procedures providing "fair notice . . . to all contractors offering such services under the multiple award contract"[73] and "a fair opportunity to make an offer and have that offer fairly considered by the official making the purchase."[74] The competitive basis requirements under Section 803 apply to all DOD task orders under the Federal Supply Schedules (FSS), Blanket Purchase Agreements (BPA) and other multiple award contracts.[75] This DOD-specific guidance requiring "competitive basis" is implemented in the *Defense Federal Acquisition Regulation Supplement* (*DFARS*) at section 216.505-70.[76]

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[64] National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 804, 113 Stat. 512, 704-05 (1999).

[65] *See* FAR, *supra* note 3, subpt. 16.505 (implementing these changes).

[66] *See* National Defense Authorization Act for Fiscal Year 2000 § 804(b)(2)(B).

[67] *Id.* § 804(b)(2)(C).

[68] FAR, *supra* note 3, subpt. 16.505(b)(1) ("The contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding $2,500 issued under multiple delivery-order contracts or multiple task-order contracts . . . .").

[69] The FAR states:

> The contracting officer shall give every awardee a fair opportunity to be considered for a delivery-order or task-order exceeding $2,500 unless one of the following statutory exceptions applies:
>
> (i) The agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays.
>
> (ii) Only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized.
>
> (iii) The order must be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order.
>
> (iv) It is necessary to place an order to satisfy a minimum guarantee.

Id. subpt. 16.505(b)(2).

[70] *Id.* subpt. 16.505(a)(2) ("Individual orders shall clearly describe all services to be performed or supplies to be delivered so the full cost or price for the performance of the work can be established when the order is placed.").

[71] National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001).

[72] *Id.* § 803(b)(1).

[73] *Id.* § 803(b)(2)(A).

[74] *Id.* § 803(b)(2)(B).

[75] Susan Tonner, *Section 803 Goes Final: Implementing Regulations Establish "Competitive Basis" for Service Orders Under Federal Supply Schedules and Multiple Award Contracts*, ACQUISITION DIRECTIONS UPDATE, Oct. 2002, at 1, *available at* http://www.acqsolinc.com/docs/upd02-10.pdf.

[76] U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 216.505-70 (July 2004) [hereinafter DFARS]. The *DFARS* is available online at http://farsite.hill.af.mil/.

II. Lack of Competition and Other Problems with Multiple Award ID/IQ

The multiple award ID/IQ system is not without problems. Some problems result from a lack of competition, and other problems from other aspects of the system.

> One of the major problems with the multiple award ID/IQ system is the prevalent practice of drafting overly-broad statements of work that cover the sun, the moon and the stars. This causes problems of competition, when orders can be placed for just about any service or product without going through normal contract award channels, and can lead to potential fiscal law problems, since the purpose of the money may not match the type of funds available, even though the order fits within the original broad statement of work.[77]

Despite Congress's concern with reduced competition, the *FAR* has a stated preference for using the multiple award approach, and government agencies are using multiple awards.[78] The problem is that with less restriction and less oversight, agencies that have experience with a particular contractor or set of contractors can select the contractors they know or like without recompeting each award and without guarantying low price or best value. Agencies can select favorite contractors by issuing additional orders without any real competition. In the multiple award system, competition necessarily suffers since the whole point of using multiple awards is "to provide a simplified process and to permit flexibility in issuing task orders."[79] Increased flexibility and improved efficiency sometimes come at the cost of competition.[80] In 2000, at least one *FAR* case reemphasized the need to maintain competition[81] and use performance-based statements of work. Unfortunately, the *FAR* Council's guidance was not very helpful to the government contracting community.[82] The main instruction, which discussed the factors the contracting officer should consider when planning for and placing orders under multiple award contracts, simply reiterated the factors listed in *FAR* subpart 16.504(c)(1)(ii).[83] When examining competition in multiple award contracting, the legal analysis should begin with the required competition standard of "fair opportunity."[84]

A. Fair Opportunity

The standard of competition in multiple award ID/IQ contracts is "fair opportunity."[85] Fair opportunity "to be considered," as described in *FAR* subpart 16.505(b)(2) means that the contracting officer must give every awardee a chance to be considered for an order of supplies or services under the contract.[86] Fair opportunity is not merely guidance but is required for every contract over $2,500, unless a statutory exception applies.[87] The exceptions are listed in *FAR* subpart 16.505(b)(2), which reiterates the fair opportunity requirement and then lists the exceptions.[88] The statutory exceptions to fair opportunity are as follows: urgent need,[89] one capable awardee due to unique or specialized supplies or services,[90] logical follow-on to an already issued order,[91] and orders placed to fulfill minimum requirements under an existing contract.[92] In addition, for DOD contracts over $100,000, agencies must use "competitive basis" procedures, which require agencies to provide fair notice of the agency's intent to make a purchase and "afford all contractors responding to the notice a fair

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[77] Interview with Major Gregory Bockin, Trial Attorney, Contract Appeals Division, U.S. Army Litigation Division, in Charlottesville, Va. (Dec. 9, 2004).

[78] FAR, *supra* note 3, subpt. 16.504(c). *But see* One Source Mech. Servs., Kane Constr., Comp. Gen. B-293692, B-293802, June 1, 2004, 2004 CPD ¶ 112.

[79] *Id.* (quoting S. REP. NO. 103-258, at 16 (1994)).

[80] Benjamin, *supra* note 51, at 452-54.

[81] FAR Case 1999-014, 65 Fed. Reg. 24,316.

[82] Benjamin, *supra* note 51, at 419.

[83] FAR Case 1999-014, 65 Fed. Reg. 24316 (Apr. 25, 2000); *see also* FAR, *supra* note 3, subpt. 16.504(c)(1)(ii).

[84] FAR, *supra* note 3, subpt. 16.505(b).

[85] *Id.* subpt. 16.505(b)(2).

[86] *Id.*

[87] *Id.* subpt. 16.505(b)(1)(i).

[88] *Id.* subpt. 16.505(b)(2).

[89] *Id.* subpt. 16.505(b)(2)(i).

[90] *Id.* subpt. 16.505(b)(2)(ii).

[91] *Id.* subpt. 16.505(b)(2)(iii).

[92] *Id.* subpt. 16.505(b)(2)(iv).

opportunity to make an offer and have that offer fairly considered by the official making the purchase."[93] The question therefore becomes: are agencies following the fair opportunity standard?

How can the fair opportunity standard be enforced if agencies simply use an exception each time? In July 2004, the Government Accountability Office (GAO) reported to Congress that in nearly half of the DOD cases reviewed, competition requirements were simply waived.[94]

> For the most part, competition was waived based on determinations that only one source could provide the service or that the work was a follow-on to a previously competed order. Although these are permitted exceptions to the competition requirements of section 803, the use of these competition waivers generally reflected the desire of program offices to retain the services of contractors currently performing the work. When contracting officers addressed requests from program offices for waivers, safeguards to ensure that waivers were granted only under appropriate circumstances were lacking . . . As a result of the frequent use of waivers, there were fewer opportunities to obtain the potential benefits of competition—improved levels of service, market-tested prices, and the best overall value.[95]

The GAO determined that the DOD guidance on granting waivers of competition requirements was poor and did not sufficiently describe the circumstances under which a waiver of competition could be used.[96] When competition was used, the GAO determined that its use was limited.[97] Importantly, when an agency does not give fair opportunity and instead uses a statutory exception, the agency must document the factual basis for using the exception.[98] When ordering under multiple award ID/IQ contracts, agencies must apply the fair opportunity standard. The DOD must apply and document the competitive basis procedures.

The Internal Revenue Service (IRS) Treasury Information Processing Support Services (TIPSS-2) multiple award ID/IQ contract provides a recent example of the use of the fair opportunity standard. Since 1998, the IRS has been reorganizing its structure and technology.[99] Part of this reorganization involves services ordered under the TIPSS-2 contract.[100] For the first four years, the IRS ordered services under TIPSS-2, and the predecessor contract TIPSS-1, avoiding the fair opportunity requirement based on an exception.[101] In July 2002, the IRS sent all eighteen TIPSS-2 awardees a request for information (RFI) soliciting technical and labor rate information for four major task areas.[102] There were no statements of work for any of the four task areas, but the RFI asked for project profiles in response to general statements of need describing support services.[103] Based on the information received in response to the RFI, the IRS selected one contractor to perform the work in two task areas and two contractors to perform the work for the remaining two task areas.[104] From July 2002 until July 2004, the IRS issued thirty-seven task orders worth $38 million.[105] Thirty-six of the task orders were to one contractor.[106] In July 2004, the GAO decided the IRS's issuance of the TIPSS-2 task orders violated the fair opportunity requirement of FASA.[107] The report specifically stated that despite the availability of eighteen eligible awardees, the IRS was selecting only certain

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[93] National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 803(b)(2)(B), 115 Stat. 1012, 1179 (2001).

[94] *Guidance Needed*, *supra* note 1, at 3.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 3. Of the forty orders available for competition, sixteen orders were made after receiving only one response to agency solicitation, fifteen orders were made after two responses, and for the remaining nine, no solicitation was used—the order was made based on previously submitted data in a manner that did not maximize competition.

[98] FAR, *supra* note 3, subpt. 16.505(b)(4) ("The contract file shall also identify the basis for using an exception to the fair opportunity process.").

[99] The Federal Acquisition Streamlining Act of 1994—Fair Opportunity Procedures Under Multiple Award Task Order Contracts, Comp. Gen. B-302499, July 21, 2004, 2004 U.S. Comp. Gen. LEXIS 148.

[100] *Id*. at *2.

[101] *Id*.

[102] *Id*.

[103] *Id*. at *2-3.

[104] *Id*.

[105] *Id*. at *3.

[106] *Id*.

[107] *Id*. at *8.

contractors to perform virtually all task orders without giving other contractors fair opportunity.[108] The IRS considered these task orders competitive rather than sole-source because of the RFI contractor selection.[109] The GAO concluded that the IRS system of using an RFI to pre-select a single contractor for an area of expected work instead of opening each requirement to all of the multiple-award contractors did not provide fair opportunity to all multiple award contractors.[110] The GAO recommended issuing future task orders in compliance with FASA's fair opportunity requirement and if feasible, terminating current task orders and replacing them using fair opportunity procedures.[111] Simply issuing an RFI does not relieve the agency of its continuing obligations to provide fair opportunity. The IRS attempted to streamline their ordering procedure; however, the GAO determined that it did not meet FASA's fair opportunity requirement. Task and delivery orders made without fair opportunity before issuing *each individual order* do not fulfill the fair opportunity requirement. Every time the agency places an order under the existing contract, it must give every awardee fair opportunity to be considered.[112]

B. Out of Scope Orders and Broad Statements of Work

Another potential problem area in multiple award ID/IQ contracts is the problem of out of scope orders—when the goods or services are not of the type specified under the contract. The opposite problem occurs when contracts have overly-broad statements of work that allow an agency to order any type of goods or services.

What makes an order out of scope? Scope determination for an order is fact specific.[113] If a statement of work is narrowly drafted, the goods and services may be easily identified; however, if the government requires a similar item or service and the statement of work is written too narrowly, the agency may be prevented from ordering the desired item.[114] To take advantage of the multiple award ID/IQ system's flexibility and efficiency, statements of work will necessarily be broadly drafted, but where is the line drawn? The FASA envisioned that detailed statements of work may not be possible at contract formation, and so "awards with broad work statements are permitted with specific work statements to be provided at the time orders are placed."[115]

So what happens when the government drafts a contract with a detailed statement of work and later decides that it needs something different from what the contract, and statement of work, originally envisioned? This was the issue the GAO confronted in the *Anteon* case.[116] In March 2004, the GAO sustained Anteon Corporation's protest that a task order for electronic passport covers was outside the scope of the General Services Administration's (GSA) multiple award ID/IQ contract for "Smart Identification Cards" (Smart Cards).[117] The contract covered identifications cards with an embedded integrated chip that would combine a traditional identification card with an electronic access card.[118] The Smart Card contract also included services such as providing card security and inventory control systems, program integration and management, and cardholder services.[119] In November 2003, GSA issued a task order for passport covers with embedded integrated chips.[120] The GSA's theory was that passport covers with integrated chips served the same function as identification cards with integrated chips and that the items were similar enough to be encompassed under the existing

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[108] *Id*. at *3, 8.

[109] *Id*. at *3.

[110] *Id*. at *5.

[111] *Id*. at *8.

[112] Note that in the DOD, awarding on a competitive basis, by giving fair notice and fair opportunity to offer, would also fulfill the fair opportunity to be considered requirement. The IRS issued an RFI once, then ordered based on that information. Had the IRS issued another RFI and allowed for competition each time a requirement arose, the case may have been decided differently. Of course, that would also defeat the IRS's apparent purpose of being finished with competition requirements prior to placing any orders.

[113] Anteon Corp., Comp. Gen. B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51, at 5 ("GAO looks to whether there is a material difference between the [task or delivery order] and the original contract.").

[114] *See, e.g.*, *Anteon Corp.*, 2004 CPD ¶ 51, at 6-7.

[115] Ralph C. Nash & John Cibinic, *Task and Delivery Order Contracting: Unique Multiple Award Arrangements*, 10 NASH & CIBINIC REP. ¶ 17 (Apr. 1996).

[116] *Anteon Corp.*, 2004 CPD ¶ 51, at 5.

[117] *Id*.

[118] *Id.* at 2.

[119] *Id*.

[120] *Id*. at 3.

contract.[121] The GAO did not agree.[122] The GAO concluded that the passport covers were significantly different from the Smart Cards originally contemplated in the contract, and were, thus, out of scope.[123] The GAO recommended that the GSA cancel the task order and compete the new requirements.[124] The *Anteon* case shows how even similar items can be out of scope of the original contract. Ordinarily, the GAO will not review task and delivery orders under multiple award contracts;[125] however, in *Anteon*, the protest was reviewable because it involved an out of scope order.[126]

If the statement of work is too narrow, the government agency may have difficulty placing an order if the desired goods or services are not as originally envisioned. If the statement of work is overbroad, contractors cannot fairly compete for the initial contract.[127] Generally, the broader the statement of work, the more flexibility the agency has in utilizing its contract. The contract with a broad statement of work becomes an easy mechanism to acquire goods and services. If the statement of work is overly-broad, however, the contract enables an agency to order additional work without providing fair notice or fair opportunity. When the multiple award system was first implemented, there was concern within the DOD that the authority to award contracts with a general work statement might be abused.[128] The FASA addressed this concern and implemented certain restrictions on statements of work.[129]

Contracting officers must choose a middle ground between narrowly-focused or overly-broad statements of work. Where is the line drawn? In the case of *Computers Universal*, the GAO upheld broad statements of objectives that reasonably encompassed the services at issue.[130] In that case, the Army obtained non-destructive inspection (NDI) and non-destructive testing (NDT) services under an Air Force multiple award ID/IQ contract.[131] Although the FASA generally precludes the GAO from reviewing task orders, the GAO used the same reasoning as in *Anteon* and reviewed the protest in *Computers Universal* because the protester claimed that the services ordered were outside the scope of the contract.[132] In *Computers Universal*, there was no traditional statement of work.[133] Instead, attached to the request for proposals was a two-page statement of objectives that set forth one program objective, nine contract objectives, and one management objective.[134] All of the objectives were "quite general."[135] Despite expressing concern, the GAO concluded that the objectives served the purpose of the statement of work and that the services ordered were of the type that potential offerors reasonably could have anticipated and were covered by the contract.[136] Interestingly, the GAO noted that they were statutorily prohibited from deciding whether the specifications in the delivery order were inadequate.[137]

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[121] *Id*. at 5.

[122] *Id*.

[123] *Id*. at 6.

[124] *Id.* at 7 ("[C]ancel the [task order] and either hold a competition for these services, or prepare the appropriate justification required by [the Competition in Contracting Act] for other than full and open competition.").

[125] *Id.* at 4 (citing 41 U.S.C. § 253j(d) (LEXIS 2005)); *see also* Corel Corp., B-283862, Nov. 18, 1999, 99-2 CPD ¶ 90, at 1.

[126] *Id*.

[127] If the statement of work is overbroad, it might provide insufficient information to potential offerors. Logically, a statement of work that does not adequately describe the government's needs will not adequately tell offerors exactly what goods or services are desired. This lack of information can cause other problems in contract administration , which will be further analyzed *infra*.

[128] Nash & Cibinic, *supra* note 48, at ¶ 30.

[129] *Id.*; *see also* FAR, *supra* note 3, subpt. 16.504(a)(4). (Statements of work should reasonably describe the general scope, nature, complexity, and purpose of the supplies or services.).

[130] Computers Universal, Inc., Comp. Gen. B-293548, Apr. 9, 2004, 2004 CPD ¶ 78.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.* at 2. For example, the single program objective was as follows:

> The objective of this program is for the offeror to provide supplemental on-site Organizational, Intermediate, and Depot level maintenance support for modification, maintenance, and repair of various DoD [Department of Defense] weapons systems and associated support equipment for any Federal Agency at locations both in CONUS [continental United States] and OCONUS [outside of continental United States] at an affordable cost.

[136] *Id.* at 3-4.

[137] *Id.* at 4 n.7.

These cases do not lend themselves to a bright-line rule for drafting statements of work. On one end of the spectrum is the narrow statement of work, where products similar to those described under a contract, but not described by the statement of work, are considered out of scope. On the other end of the spectrum is the situation where the statement of work is so broad as to encompass every type of service that could possibly be anticipated; in those cases, any goods or services would be considered in scope. This dilemma will continue to pose a problem in the future. If government agencies draft broad statements of work, the agencies will avoid successful protests on the scope basis. If nothing is out of scope, however, how will potential contractors understand the agency's true intent behind the contract and be able to craft their offer accordingly? What is clear is that broad statements of work assist agencies in circumventing competition.

In addition to unfairly avoiding competition, overbroad statements of work create problems in contract administration.[138] One publicly recognized example of contract failure is prisoner abuse by contractors at Abu Ghraib prison in Iraq.[139] Major General George R. Fay investigated the use of contract interrogators under a contract originally calling for translators.[140] The contract called for translation services and did not mention interrogation.[141] The problem of ordering work beyond the scope of the contract was compounded by inadequate oversight over the contracting process, especially in the area of contract administration.[142] Inadequate oversight in contract administration resulted in the following failures: lack of proper training for contractors on interrogation rules of engagement, lack of oversight to ensure intelligence gathering by contractors complied with the law, lack of a clear chain of command, lack of management of contractor personnel, and lack of performance monitoring.[143]

Problems with overly-broad statements of work are not easily resolved. Statements of work are highly fact specific and will be drafted necessarily without much specific instruction since the facts of each contract will dictate the wording. Broad statements of work often benefit the government in ordering, so contracting officers do not have much incentive to draft narrow statements of work.[144] Compounding the problem, if the statement of work is broad enough, the GAO will not review the case. The only realistic basis for a GAO protest review occurs when the order is beyond the scope of the contract.[145] As long as the statement of work is broad enough, any order conceivably will be within scope and unreviewable.[146]

C. Other Problems

Other problems with the multiple award ID/IQ system concern: contract administration, management, oversight, and dispute resolution. These problems have not gone unnoticed:

> I would like to address two matters that cry out for Congressional attention and intervention. First, the federal government must devote more resources to contract administration, management, and oversight. This investment is an urgent priority given the combination of the 1990's Congressionally-mandated acquisition workforce reductions and the Bush administration's relentless pressure to accelerate the outsourcing trend. Second, the proliferation of interagency indefinite-delivery contract vehicles, and the

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[138] *See, e.g.*, Schooner Statement, *supra* note 27 ("The worst-case scenario arises where the a [sic] contractor performs work under an open-ended contract (e.g., with a vague or ambiguous statement of work) without guidance or management from a responsible government official (e.g., in the absence of an administrative contracting officer or contracting officer's representative).").

[139] *Id*.

[140] LTG Anthony R. Jones & MG George R. Fay, Army Regulation 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 48 (Aug. 23, 2004), *available at* http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf [hereinafter Fay Report].

[141] *Id.*

[142] *Id.* at 48-52.

[143] *Id.*

[144] The *Anteon* case indicates that it is to the government's detriment to draft a narrow statement of work since the agency cannot order similar items without issuing a new contract.

[145] FAR, *supra* note 3, subpt. 16.505(a)(9) ("No protest under Subpart 33.1 is authorized in connection with the issuance or proposed issuance of an order under a task-order contract or delivery-order contract, except for a protest on the grounds that the order increases the scope, period, or maximum value of the contract (10 U.S.C. 2304c(d) and 41 U.S.C. 253j(d))."). Once the overbroad statement of work is drafted, protesters have no GAO recourse. Only the reverse is true – if the statement of work is narrowly drawn, and the order is outside the scope of the statement of work - then the protester would have a valid protest ground.

[146] Although it is not in the drafter's interest to narrowly-tailor the statement of work, overly-broad statements of work cause contract administration problems that ultimately circumvent competition requirements.

> perverse incentives that derive from these fee-based procurements, have prompted troubling pathologies that require correction and constraint.[147]

The Abu Ghraib prisoner abuse contract provides one example of the problems associated with contract administration and lack of oversight. "It is apparent that there was no credible exercise of appropriate oversight of contract performance at Abu Ghraib. . . . Proper oversight did not occur at Abu Ghraib due to a lack of training and inadequate contract management and monitoring."[148] The remote locations and sheer number of contractor employees posed a considerable challenge to contract administration.[149] As long as there are decreased numbers of government contract personnel to administer a growing number of contracts, lack of oversight will continue to be a problem.[150] Multiple award ID/IQ contracts, with less government control and less government oversight, are particularly prone to contract administration problems.

How are the different agencies changing their procedures to meet these difficulties? In July 2003, the U.S. Army announced that instead of Kellogg Brown and Root's non-competitively awarded emergency oil infrastructure contracts, future oil infrastructure contracts would be awarded competitively.[151] The GAO continues to review Iraq reconstruction contracts, finding that even when agencies followed the applicable laws and regulations, competition was still lacking. More acquisition personnel and resources are needed to address current problems.[152]

Is there a need for further statutory guidance? In September 2004, the DOD established the multiple award contract sole source approval threshold and emphasized the need for waiver justification.[153] Currently, every sole source award over $100,000 must be approved at higher levels than before, in a manner similar to new contract actions under *FAR* subpart 6.304.[154] This requirement should be codified to increase contract oversight at the formation stage. Statutory guidance should be added as well to address what factors to consider in approving waiver justifications.

Another problem with the multiple award ID/IQ system is the statutory system of resolving disputes. Dispute resolution is not easy under the multiple award ID/IQ system. When a contractor protests that it is not receiving the required fair opportunity to compete, the GAO may decline to review the case[155] in deference to the statutory scheme[156] providing for a task and delivery order ombudsman[157] who is "responsible for reviewing complaints from contractors, and for ensuring that all of the contractors are afforded a fair opportunity to be considered for task and delivery orders."[158] The question still remains, if the GAO declines review, will the Court of Federal Claims review the case after the task-order and delivery order

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[147] Schooner Statement, *supra* note 27, at 1.

[148] Fay Report, *supra* note 140, at 52.

[149] *Id.*

[150] Replacing government personnel with civilian contractors also creates the need for trained government personnel to supervise the contractor personnel. Schooner Statement, *supra* note 27, at 7.

[151] The Kellogg Brown and Root's ID/IQ contracts were broad in scope and reconstruction needs could be quickly acquired, but at the expense of competition. The Army decided to inject more competition into the process. *Corps to Competitively Award Iraqi Oil Infrastructure Contracts*, 45 GOV'T CONTRACTOR NO. 25, at 7 (2003).

[152] *GAO Continues to Review Iraq Reconstruction Contracts and Task Orders*, 46 GOV'T CONTRACTOR NO. 24, at 249 (2004).

[153] Memorandum, Deirdre A. Lee, Director, Defense Procurement and Acquisition Policy, to Senior Procurement Executives and Directors of Defense Agencies, subject: Approval Levels for Sole Source Orders Under Federal Supply Schedules (FSSs) and Multiple Award Contracts (MACs)(13 Sept. 2004) [hereinafter Lee Memorandum] ("Any determination waiving competition must solidly support the action. . . Contracting officers must ensure requirements offices provide adequate information to support determinations to waive competition, to include the results of market research and data to support why further competition is not in the Government's best interest.") (on file with author).

[154] *Id*. In new contract actions, justification for other than full and open competition has to be approved in writing. The amount of the contract determines the approval level. For example, for contracts under $500,000, the contracting officer can approve the justification. For contracts over $500,000 and under $1,000,000, the justification must be approved by the competition advocate for the procuring activity. FAR, *supra* note 3, subpt. 6-304(a).

[155] *Id*. subpt. 16.505(a)(9) (The ground on which one could protest is "that the order increases the scope, period, or maximum value of the contract. . ."). Note, however, the GAO will consider protests which involve use of an ID/IQ task or delivery order to acquire goods and services in violation of other *FAR* requirements. *See*, *e.g.*, LBM, Inc., Comp. Gen. B-290682, Sept. 18, 2002, 2002 CPD ¶ 157, at 9 (The limitations on GAO's jurisdiction over protests of task and delivery orders do not apply when the protester was not challenging the proposed issuance of a task order but rather raising the question of whether work that had been previously set aside for small businesses could be transferred to Logistical Joint Administrative Management Support Services (LOGJAMSS) contracts, which are multiple award ID/IQ contracts, in violation of *FAR* requirements pertaining to small business set-asides.)

[156] FAR, *supra* note 3, subpt. 16.505(b)(5) ("The head of the agency shall designate a task-order and delivery order ombudsman. The ombudsman must review complaints from contractors and ensure they are afforded a fair opportunity to be considered, consistent with the procedures in the contract.").

[157] *Id.* ("The ombudsman must be a senior agency official who is independent of the contracting officer and may be the agency's competition advocate.").

[158] Prof'l Performance Dev. Group, Inc., Comp. Gen. B-294054.3, Sept. 30, 2004, 2004 U.S. Comp. Gen. LEXIS 195, at n.3 (citing 41 U.S.C. § 253j(e) (LEXIS 2005)).

ombudsman makes a decision? On a more fundamental level: why is ID/IQ contracting exempt from the GAO review? If the idea is to make the process less formal and less protestable, then Congress succeeded. Congress did not have to exempt task and delivery orders from GAO review. As a result, contractors do not have a protest option, but instead will have to work within the current, and more difficult, ombudsman scheme.

III. Recommendations

In July 2004, the GAO recommended that the Secretary of Defense develop additional guidance on the use of fair opportunity waivers.[159] In addition, the GAO recommended that the DOD require the use of justifications for waivers and establish approval levels for waivers under multiple award contracts, similar to the sole source FSS orders.[160] The challenge for DOD is to find the right balance between promoting competition and retaining contractors that satisfy DOD customer needs.[161] Frequent use of competition waivers may indicate that end users are satisfied with current vendors, but the lack of competition may hinder newer, more innovative solutions and market forces. The government should require contracting officers to more thoroughly document waiver decisions and establish an approval process that would enhance oversight.[162] Contract professionals will continue to use competition waivers, especially if they are satisfied with a particular vendor and wish to continue using that vendor. Contract drafters must balance the advantage of ordering flexibility under broad statements of work with the disadvantage of potential contract administration problems under unclear and imprecise statements of work.

Agencies can and should also improve contract oversight at the formation and administration stages. Since establishment of the multiple award contract sole source approval threshold in September 2004,[163] every sole source decision over $100,000 receives substantial oversight. This oversight is a good start, but only time will tell if the added oversight will help. Until these thresholds become regulatory law, agencies can simply change the approval levels again when the political eye is off competition and agencies desire more efficiency. Hopefully, higher level officials will continue to monitor contract awards carefully, with an eye towards competition, but this type of supervision will depend on the leaders.[164] Statutory or regulatory authority should specify waiver justification, but enforcement still will be difficult. Practitioners should carefully document and justify waivers in appropriate situations.

Increasing the number of contracting professionals would allow for more management and oversight, as well as for enforcement.[165] Contracting personnel are asked to perform too many contract actions, especially in light of the time and cost of proper competition procedures.[166] In its report on Iraq reconstruction, the GAO recommended that the DOD improve the contract personnel situation in future operations.[167] Agencies may wish to increase contract personnel. This may be the right

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[159] *Guidance Needed*, *supra* note 1, at 3. The GAO specifically recommended that the Secretary of Defense: "develop additional guidance on the circumstances under which competition may be waived, require detailed documentation to support competition waivers, and establish approval levels above the contracting officer for waivers of competition on orders exceeding specified thresholds." *Id.* at 3-4.

[160] *DOD Task Orders Lack Competition*, 46 GOV'T CONTRACTOR NO. 29, at 298 (2004) (citing GEN. ACCT. OFF., REP NO. GAO-04-874, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, at 3 (July 2004), *available at* http://www.gao.

gov/new.items/d04874.pdf).

[161] *Guidance Needed*, *supra* note 1, at 3.

[162] *Id.*

[163] Lee Memorandum, *supra* note 153.

[164] In the case of Darleen Druyun, former Air Force procurement official, and the recent Boeing lease deal, using open negotiations and more traditional competition processes may have made it more difficult for a corrupt individual to taint the system. Steven L. Schooner, *Adding Up Efficiency's Cost*, LEGAL TIMES, Nov. 1, 2004. The level of official oversight depends on the amount and type of waiver, however, when the highest procurement official is corrupt, the system has to create more checks and balances to keep abuse in check.

[165] *Id.* ("[T]he federal government must devote more resources to contract management and oversight, particularly in the light of sustained pressure to outsource the government's work."); Fay Report, *supra* note 140, at 52 ("Meaningful contract administration and monitoring will not be possible if a small number of [contracting personnel] are asked to monitor the performance of one or more contractors who may have 100 or more employees in the theater, and . . .in several locations . . .").

[166] Nash & Cibinic, *supra* note 2, at 7 ("[O]ne of the reasons for avoiding competition is the time and cost of soliciting and evaluating proposals. . . Award of too many multiple award contracts and too elaborate selection procedures are to blame for much of the delay and cost involved with competition for task orders.).

[167] *Rebuilding Iraq*, *supra* note 42, at 30 ("To improve the delivery of acquisition support in future operations, we recommend that the Secretary of Defense. . . develop a strategy for assuring that adequate acquisition staff and other resources can be made available in a timely manner.").

time to inject much needed reform into the contract personnel situation. Because incidents such as Abu Ghraib and the Boeing lease situation have been brought to the public's attention, the U.S. government should place more resources and personnel in contracting positions and supervisory positions now while the nation is still shocked by these incidents and willing to make changes.