CONTRACT FORMATION

Authority

"That's The Way We Do It" Does Not Necessarily Constitute Authority to Bind the Government

In one case this fiscal year, the Court of Federal Claims (COFC) provided a textbook examination of the authority of a Government representative to bind the government and clarified the circumstances under which a government representative has implied actual authority. In *SGS-92-X003 v. United States*,[1] the Assistant Special Agent in Charge (ASAC) of a Drug Enforcement Agency (DEA) district office had promised a confidential informant also known as "Princess" a 25% commission on the value of seizures made as a result of information she provided to the DEA, up to $250,000 per seizure.[2] Princess proved to be an extraordinarily effective confidential informant, resulting in "unparalleled" success by the agency in prosecutable cases against major Columbian drug traffickers and the seizure of drug proceeds.[3] While Princess received several payments for her services totaling approximately $2 million, the proceeds of the seized assets were considerably more than that, leading to her suit for nearly $34 million in damages for breach of the alleged oral implied-in-fact contract.[4] The Government moved for summary judgment, arguing that the ASAC lacked authority to bind the Government and that nobody with contracting authority ever ratified the promise to pay the informant.[5]

Because actual authority to bind the government is a necessary element of any implied-in-fact contract with the government,[6] the court examined each theory under which the ASAC might have possessed that actual authority or whether the promise was ratified by someone with such authority. Starting by searching for express actual authority, the court observed that the statute governing the Asset Forfeiture Fund did not authorize the ASAC to promise to pay the informant a commission.[7] The court quoted from the DEA Manual, which expressly provided that "DEA can pay an informant a commission based upon some percentage of the value of cases he provides."[8] However, the DEA Manual did not specify which particular DEA officials were authorized to pay such a commission.[9] The court explained that this vagueness as to whether the ASAC was authorized to make the promise to the informant, "certainly did not constitute an unambiguous grant of express actual authority to bind the Government even if the [c]ourt were to accept the DEA Manual as a 'regulation.'"[10]

Finding no unambiguous statute or regulation which granted the ASAC express actual authority to bind the government,[11] the court then turned to whether the ASAC possessed implied actual authority to enter into such a contract. A government official has implied actual authority to bind the government "when such authority is considered to be an integral part of the duties assigned to a government employee."[12] That authority is deemed an "integral" part of an official's duties

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[1] 74 Fed. Cl. 637 (2006).

[2] *Id*. at 638.

[3] *Id*. at 648. Princess's efforts over the four years she served as a confidential informant resulted in the arrest of dozens of major Columbian drug traffickers, prosecutable cases against dozens of additional "cellheads" in the United States and elsewhere, many "spin-off" investigations, and the seizure of tens of millions of dollars of drug proceeds. *Id*. The DEA ASAC described her as "the best informant he had ever encountered in his 31-year tenure with DEA 'from the standpoint of value to the Agency . . . her abilities to follow direction, to be innovative and to infiltrate the very highest levels of the criminal element.'" *Id*. at 640.

[4] *Id*. at 638.

[5] *Id*. at 650.

[6] The court noted that establishing the existence of an implied-in-fact contract with the government requires the plaintiff to prove: "(1) mutuality of intent; (2) consideration; (3) lack of ambiguity in the offer and acceptance; and (4) actual authority to bind the Government in contract on the part of the Government representative whose conduct is relied upon." (citing Flexfab, L.L.C. v. United States, 424 F.3d 1254, 1258 (Fed. Cir. 2005)). *Id*.

[7] *Id*. at 651. The Asset Forfeiture Fund is governed by 28 U.S.C. § 524, which authorized the payment of awards of up to $250,000 "at the discretion of the Attorney General or his delegate," with limited delegation of award amounts greater than $250,000. The court cited previous cases holding that this statute did not grant DEA agents authority to bind the government to similar promises of awards to informants. *Id*. (citing Salles v. United States, 156 F.3d 1383, 1384 (Fed. Cir. 1998); Brunner v. United States, 70 Fed. Cl. 623, 641 (2006); Khairallah v. United States, 43 Fed. Cl. 57, 63–64 (1999); Cruz-Pagan v. United States, 35 Fed. Cl. 59, 59–60 (1996)).

[8] *SGS-92-X003*, 74 Fed. Cl. at 651 (quoting DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, DEA AGENTS MANUAL § 6612.44 (2002)).

[9] *Id.*

[10] *Id*. at 652. The court noted that an earlier case had "recognized that the DEA Manual was not a published regulation." *Id*. at 652 n.25 (citing *Brunner*, 70 Fed. Cl. at 645).

[11] *Id*. at 652.

[12] *Id*. (quoting H. Landau & Co. v. United States, 886 F.2d 322, 324 (Fed. Cir. 1989)).

when the official "cannot perform his assigned tasks without such authority and when the relevant agency's regulations do not grant the authority to other agency employees."[13]

Application of that standard normally results in a finding that law enforcement officers do not have inherent authority to make binding promises of compensation to informants, because "such officers can obtain authority from higher ranking officers via established procedures to pay informants and witnesses for their services, with the result that contracting authority is not needed for the agents to perform their jobs."[14] But unlike prior decisions of the court in which DEA agents were summarily found to lack this authority,[15] the court in this case found a genuine issue of material fact as to whether the ASAC had implied actual authority to make a binding promise to pay the informant a commission.[16] The record was not clear on the extent of the ASAC's duties as the head of a DEA office, but the ASAC believed that his actions were consistent with "accepted practices in these situations" and his authority as head of the district office.[17] Frequent meetings with high level DEA and Department of Justice (DOJ) officials regarding "Operation Princess," and the grant of an "Attorney General's exemption" to spend proceeds from undercover operations for expenses of the operation, further muddled the question as to whether the ASAC had this authority.[18] The court was unable to determine whether the authority to contract was an integral part of the ASAC's duties because "the 'procedures' for promising and paying Princess appear to have been anything but 'established'" for the ASAC in this case.[19] The court therefore denied the cross-motions for summary judgment on the issue of implied actual authority.[20]

If the ASAC lacked implied actual authority to bind the government to ASAC's promise to pay the informant a commission, there is also the question of whether someone with actual authority subsequently ratified ASCA's promise. The court found genuine issues of material fact as to this question as well.[21] Ratification requires that the person possessing actual authority have "full knowledge of all the facts" before ratifying the unauthorized act.[22] The ASAC believed that the high level DEA and DOJ officials who attended the frequent meetings on Operation Princess knew and approved of the promise.[23] However, those officials testified that they did not recall hearing about it.[24] Knowledge of the unauthorized promise is also a key requirement for institutional ratification, which "occurs when the Government seeks and receives the benefits from an otherwise unauthorized contract."[25] Because there were genuine issues of material fact as to whether DEA or DOJ officials with authority to contract knew about the promise, the court was unable to grant summary judgment on the issue of individual or institutional ratification.[26]

Contracting Officer's Representatives Do Not—and Cannot—Have Authority to Make Changes

The recent case of *Winter v. Cath-dr/Balti Joint Venture*, held that no matter what the Government does or says, no amount of apparent authority will give someone actual authority to modify a contract where a contract clause explicitly

[13] *Id.*

[14] *Id.* at 653 (quoting Gary v. United States, 67 Fed. Cl. 202, 214 (2005)).

[15] *See, e.g.*, *Gary*, 67 Fed. Cl. 202; Tracy v. United States, 55 Fed. Cl. 679 (2003); Doe v. United States, 48 Fed. Cl. 495 (2000); Khairallah v. United States, 43 Fed. Cl. 57 (1999); Cruz-Pagan v. United States, 35 Fed. Cl. 59 (1996).

[16] *SGS-92-X003*, 74 Fed. Cl. at 655.

[17] *Id.* at 652.

[18] *Id.* at 653.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 654.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

reserves that authority to the contracting officer.[27] This Federal Circuit case reversed a recent ASBCA decision that a contractor was entitled to an equitable adjustment for changes directed by contract's Project Manager (PM).[28]

In *Winter*, the Navy had given the contractor every indication that a Resident Officer in Charge of Contracts (ROICC), who was also the Project Manager (PM), had express or at least implied authority to make contract modifications during the course of performance of a facility renovation contract. Before construction began, the contractor was required to meet with the contracting officer at a preconstruction conference for the express purpose of clarifying contract administration. At the conference, which was attended by the ROICC PM and several other government representatives but not the contracting officer, the Navy "designated the ROICC PM to administer the contract and stated that all correspondence should be addressed to the attention of . . . the active ROICC PM."[29] The Navy's guidance to the contractor seemingly made it clear that the ROICC PM was authorized to make contract modifications, including in the presentation a slide that stated:

> Contract Modifications
>
> Modifications are written alterations to the contract which may change the work to be performed and/or the contract price and time. Oral modifications will not be used.
>
> • Bilateral modification—the contractor and the ROICC have agreed upon an adjustment to the contract
>
> • Unilateral modification—the ROICC can direct the contractor to take some action under the contract
>
> No work is to be performed beyond the contract requirements without written notification from the ROICC.[30]

The Navy's statements and actions during contract administration further reinforced the belief that the ROICC PM had this authority. The ROICC PM signed all responses to the contractor's numerous Requests for Information seeking clarification of contract requirements and decisions on contract deviations due to site conditions.[31] When a successor ROICC PM later assumed duties, the contractor specifically sought "documentation of assignment of authority" and his "level of authority," and the Navy's response indicated that the ROICC PM was responsible for "construction management and contract administration" and providing "technical and administrative direction to resolve problems encountered during construction."[32] The contracting officer apparently did nothing to dissuade the understanding that the ROICC PM had authority to direct contract changes. When the ROICC PM failed to timely act on the contractor's cumulative request for equitable adjustment when the contract was substantially completed, the contractor submitted a certified claim to the contracting officer for costs incurred in performing thirty-seven tasks alleged to be changed work.[33] The contracting officer

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[27] 497 F.3d 1339 (Fed. Cir. 2007), *rev'g* Cath-dr/Balti Joint Venture, ASBCA Nos. 53581, 54239, 05-2 BCA ¶ 33,046.

[28] *Id.*

[29] *Id*. at 1342.

[30] *Id.* at 1346. Other information provided to the contractor at the preconstruction conference also seemingly suggested that the ROICC PM was the first level decision-making authority for contract changes. For example:

> The presentation directed the contractor to use the Requests for Information (RFI) form routinely and "[i]f necessary, forward RFI to *Navy PM* for action." . . . Another slide related to disputes directed the contractor to submit a request for equitable adjustment to the ROICC if it feels a contract modification is required and "[i]f the ROICC sees no entitlement, or the contractor doesn't agree with the entitlement, the contractor has the right to request a Contracting Officer's Final Decision, using the procedures outlined in the Disputes Clause" but that "[t]he contractor must proceed diligently with the work while awaiting the final decision."

Id. at 1342 (alteration in original).

[31] *Id*. at 1342–43.

[32] *Id*. at 1342. The Navy's response provided the following description:

> Project Manager: Serves as the Government Construction Manager on all assigned projects. Responsible for construction management and contract administration on assigned projects while providing quality assurance and technical engineering construction advice. Provides technical and administrative direction to resolve problems encountered during construction. A project manager analyzes and Interprets contract drawings and specifications to determine the extent of Contractors' responsibility. Prepares and/or coordinates correspondence, submittal reviews, estimates, and contract modifications in support to ensure a satisfactory and timely completion of projects.

Id.

[33] *Id.* at 1343.

issued a Final Decision finding entitlement as to several of the claims and recommended that the contractor and ROICC PM negotiate the amount the contractor should be paid on those claims.[34] The contracting officer's denial of most of the claims was not because of the issue of whether the ROICC PM had authority to direct the changes, but because he deemed them to be tasks that were already required by the contract, rather than being contract changes.[35]

Hearing the case two years ago, the ASBCA found that the contractor was entitled to an equitable adjustment with respect to some of the claims.[36] The Board determined that the ROICC PM's delegation of authority, which stated that he was "responsible for construction management and contract administration," had provided him "express actual authority to make any changes that were necessary to resolve problems at the site."[37]

On appeal this year, the Federal Circuit reversed the ASBCA decision, holding that the ROICC PM had neither express nor implied actual authority to make contract changes.[38] The court noted that the Department of Defense specifically prohibits delegating to a contracting officer's representative (COR) the authority to make contract changes that affect price or other contract terms,[39] and that this prohibition was incorporated into the contract by the clause at Defense Federal Acquisition Regulation Supplement (DFARS) 252.201-7000.[40] The contract also contained two Naval Facilities Engineering Command (NAVFAC) clauses that indicated that only the contracting officer had authority to make changes that are binding on the government.[41] Therefore, the ROICC PM did not have, and could not have had, express authority to make binding contract changes.[42]

The issue of implied actual authority, however, presented "a much closer case."[43] A government employee has implied actual authority to bind the government when such authority is considered to be "an integral part of the duties assigned to the particular government employee."[44] Despite the Navy's contract administration instructions to the contractor, and the contractor's dutiful compliance with those instructions, "[t]he problem is that these Navy directives contradicted the clear language of the contract and it is the contract which governs."[45] The court held that the explicit contract language granting to the contracting officer exclusive authority to modify the contract precluded anyone else from impliedly having that authority:

> Here, the ROICC could not have had the implicit authority to authorize contract modifications because the contract language and the government regulation it incorporates reference explicitly state that only the contracting officer had the authority to modify the contract. Modifying the contract would not be

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[34] *Id.*

[35] *Id.* at 1349 (Prost, J., dissenting).

[36] Cath-dr/Balti Joint Venture, ASBCA Nos. 53581, 54239, 05-2 BCA ¶ 33,046.

[37] *Id.* at 33,046. The board noted that the ROICC PM was also "the key government person with respect to performance," a fact which in a past decision had caused the board to find that a Project Officer "was impliedly authorized to make changes where expeditious action was required." *Id.* (citing Urban Pathfinders, Inc., ASBCA No. 23134, 79-1 BCA ¶ 13,709). This suggests that had the board not determined that the ROICC PM had express actual authority, it would have found he had implied actual authority.

[38] *Cath-dr/Balti*, 497 F.3d at 1341.

[39] U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. pt. 201.602-2 (July 2007) [hereinafter DFARS]. The relevant portion provides that a contracting officer representative "[h]as no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract . . . ." *Id.* at 201.602-2(2)(iv).

[40] *Cath-dr/Balti*, 497 F.3d at 1345. The COR clause provides, in relevant part:

> If the Contracting Officer designates a contracting officer's representative (COR), the Contractor will receive a copy of the written designation. It will specify the extent of the COR's authority to act on behalf of the contracting officer. The COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract.

DFARS, *supra* note 40, at pt. 252.201-7000(b).

[41] The contract contained NAVFAC clause 5252.242-9300 entitled "Government Representatives," and NAVFAC clause 5252.201-9300 entitled "Contracting Officer Authority," both of which provided that changes directed by government employees other than the contracting officer are not binding unless formalized by a document executed by contracting officer. *Cath-dr/Balti*, 497 F.3d at 1345.

[42] *Id.*

[43] *Id.* at 1346.

[44] *Id.* (citing H. Landau & Co. v. United States, 886 F.2d 322, 324 (Fed. Cir. 1989)).

[45] *Id.*

> "considered to be an integral part of [the ROICC project manager's] duties" when the contract explicitly and exclusively assigns this duty to the [contracting officer] CO.[46]

There being no express or implied authority for the ROICC PM to make contract changes, the court remanded the case to the ASBCA to determine whether the contracting officer's initial Final Decision finding entitlement to some of the contractor's claims constituted a ratification of the changes directed by the ROICC PM, an issue that the board previously had no need to address since it had found express authority to make the changes.[47]

Both the *Cath-dr/Balti* decision, and the previously discussed COFC decision in *SGS-92-X003 v. United States*,[48] demonstrate that contracting officer's representatives cannot have either express or implied authority to bind the government to any contract changes they direct. While the Army and Air Force do not compel the use of clauses comparable to the NAVFAC clauses, the DFARS requires the use of the COR clause whenever the contracting officer anticipates appointing a contracting officer's representative.[49] That clause specifically states that contracting officer's representatives are "not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract."[50] Under the reasoning of *Cath-dr/Balti*, the fact that the contract and the DFARS explicitly reserves authority to make those changes to the contracting officer means that the COR cannot have implied authority to bind the government to such changes regardless of the circumstances. Similarly, the holding in *SGS-92-X003*, that implied authority is an "integral" part of the employee's duties when he "cannot perform his assigned tasks without such authority and when the relevant agency's regulations do not grant the authority to other agency employees,"[51] means that authority to make those changes will never be an integral part of the COR's duties because that authority has been granted to the contracting officer. This leaves ratification as the only viable theory under which a contractor can attempt to recover for increased costs occasioned by COR-directed changes.

Lieutenant Colonel Michael L. Norris

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[46] *Id*. (citing *Landau*, 886 F.2d at 324) (alteration in original).

[47] *Id*. at 1346–47. The contractor argued that the contracting officer's final decision "reflects the fact that a person with actual authority and sufficient knowledge of the material facts endorsed the actions [of the ROICC PM] and found entitlement . . . ." *Id*. One factual issue still in dispute is whether the contracting office had full knowledge of the facts. The court noted: "While it appears from the detailed fifteen-page decision that the CO did have full knowledge, the government contends he did not." *Id*. Judge Prost dissented from this portion of the court's opinion, viewing the contracting officer's decision letter, which recommended that the contractor and ROICC PM go back and negotiate the amount the contractor should be paid on the claims to which the contracting officer found entitlement, "as simply an attempt by the CO to settle the claims" for work done beyond the terms of the contract. *Id*. at 1349. Additionally, Judge Prost noted that the contract provided that unauthorized changes would not be binding on the Government "unless formalized by proper contractual documents executed by the Contracting Officer prior to the completion of this contract," and that the alleged ratification did not meet those requirements. *Id*. at 1350.

[48] 74 Fed. Cl. 637 (2006).

[49] DFARS, *supra* note 38, at pt. 201.602-70.

[50] *Id*. at pt. 252.201-7000(b).

[51] *SGS-92-X003*, 74 Fed. Cl. at 652.

Competition

Failing to Consider Licensing and Alternatives from Previous Procurements Can Be Construed as Failing to Properly Plan for an Acquisition

In *eFEdBudget Corp.*,[1] the Government Accountability Office (GAO) sustained a protest while highlighting the importance of acquisition planning.[2] The GAO determined that the Department of State (DOS) gave up substantial rights in software that the incumbent contractor created under a developmental contract, and that DOS failed to explore the possibility of acquiring additional rights to software.[3] The protester alleged the justification and approval (J&A) was deficient and that the agency unreasonably refused to consider eFedBudget's approach in using non-proprietary software.[4] The GAO denied the protest on the grounds the protests alleged, but nevertheless found DOS had failed to adequately plan for the acquisition.[5] According to the GAO, the agency must consider whether the costs associated with continued relationship outweighs the anticipated benefits of completion and this must be included in the agency's acquisition planning.[6]

The protester challenged the DOS pre-solicitation notice for a sole-source contract for continued implementation, maintenance, enhancement, and support for the department's budget software systems alleging that the agency improperly refused to consider its alternative proposal.[7] The protester also alleged that the agency would not violate its license by allowing eFEdBudget Corp. to perform the requirements without holding explicit rights under the license.[8]

The DOS originally contracted with the incumbent, RGII Technologies Inc. (RGII), for a central management system in 1997 and relied upon it exclusively for nine years.[9] In 2000, DOS entered into a licensing agreement with RGII which limited the government's rights to the software created.[10] The licensing agreement only allowed the DOS to use the software within DoS, and prohibited the DOS from disclosing the licensed software to contractors or using the software with other software in order to implement the software.[11]

The agency, citing 41 U.S.C.§253(c)(1) (which states that there is only one responsible source and no other supplies or services will satisfy agency requirements), claimed that without this contract, the agency would experience an "immediate and substantial" delay in its ability to meet the budgetary and finance needs of DOS.[12] The J&A further stated that without this contract, DOS would have to redesign its budget system with another software product, given the licensing agreement with RGII.[13] The agency described the time needed to properly determine the requirements for a new system as "significant."[14]

The protester did not prevail on any of the grounds it proffered, however, the GAO sustained the protest on other grounds.[15] In looking at the reasonableness of the agency's rationale in the J&A,[16] the GAO found that the agency failed "to

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[1] Comp. Gen. B-298627, Nov. 15, 2006, 2006 CPD ¶ 159.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* at 2–8.

[6] *Id.* at 8.

[7] *Id.* at 5.

[8] *Id.*

[9] *Id.* at 2. eFEdBudget was a subcontractor under the original contract. The principal for eFEdBudget worked for RGII until 2004, leaving "under less than amicable circumstances." *Id.*

[10] *Id.* RGII copyrighted the software under the name "Monument." *Id.*

[11] *Id.* The agency expected to benefit from upgrades without having to expend additional funds for them. *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 4.

[15] *Id.* at 7.

[16] The GAO explained the criteria for determining reasonableness in Lockheed Martin Sys. Integration—Owego, Comp. Gen. B-287190.2, B287190.3, May 25, 2001, 2001 CPD ¶ 110.

satisfy its statutory obligation to engage in reasonable advance planning before proceeding with a sole-source award."[17] The DoS did not address the steps it took to end its reliance on the incumbent's software.[18] The agency failed to make long-term plans when it did not take advantage of an opportunity to purchase a source code license two years earlier.[19] The moral of the story is when an agency does its acquisition planning, it must consider the long-term ramifications and solutions.

If You Make a Claim Regarding Why a Specific Brand or Type Is Required, It Would Be Nice to Have the Data to Support It

In *General Electrodynamics Corp.* (GEC),[20] GEC protested the planned award of a five-year indefinite delivery indefinite quantity (ID/IQ) contract for digital aircraft weighing scales.[21] GEC complained that the requirement was unduly restrictive because it excluded scales with hydraulic components or mechanical load sensing devices.[22] While the GAO denied the protest, it did not agree with all the Government's arguments in response to the protest.[23] The GAO did, however, find that the requirements were reasonably related to the agency's needs and it found that the requirements as a whole were not unduly restrictive.[24] The teaching point in this case is the reasoning behind GAO's disagreements with the agency.

The agency posted a synopsis of its requirement on FedBizOpps requiring a purchase item description (PID) of Intercomp digital aircraft weighing scales (DAWS).[25] The PID stated that the scales "shall not utilize any hydraulic components or mechanical load sensing devices."[26] The Agency intended to use the scales worldwide to "weigh aircraft within the Army inventory, in and out of battle conditions, to ensure that the weight of the aircraft does not exceed safe limits."[27] When the agency denied a request to remove the PID, GEC protested claiming that the solicitation was unduly restrictive because it excluded scales with hydraulic or mechanical load sensing devices.[28]

While the Army offered no empirical data for its claims regarding the ease of calibration, maintenance, and reliability of the model it requested, the protester did offer empirical support for its position.[29] The protester submitted empirical data from the Air Force in 2002, that when "reasonably interpreted," showed that the GEC's scales were easier to calibrate than Intercomp's.[30] The agency then searched for data by sending an e-mail message to an Air Force Metrology and Calibration (AFMETCAL) Program employee who was a DAWS mechanical engineer, inquiring whether a rigorous study had been accomplished comparing the suitability of the two load cell technologies in platform scale applications for aircraft weighing operations. In the absence of such a study, the e-mail further asked whether the employee could obtain a memorandum describing the technologies.[31] The GAO found that the agency's claim that excluding scales that used hydraulic load cells from consideration because scales with electronic load cells are easier to calibrate was "unpersuasive."[32]

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[17] *Id.* at 7.

[18] *Id.* at 8.

[19] *Id.*

[20] Comp. Gen. B-298698; B-298698.2, Nov. 27, 2006, 2006 CPD ¶ 180. Although the Army issued a synopsis on FedBizzOps.gov stating its intent to award a sole source contract to Intercomp Company Inc. pursuant to FAR 6.302 (One Source), the synopsis also stated that proposals received within forty-five days would be considered. *Id*. at 1-2. While the protester submitted a response, the agency issued a solicitation requiring the Intercomp brand digital aircraft weighing scales (DAWS). Subsequently, GEC protested and then the Army took corrective action withdrawing the original protest to be withdrawn. *Id.* at 2.

[21] *Id.*

[22] *Id.*

[23] *Id.* The Government claimed the scales they required were easier to calibrate, more reliable and easier to maintain and therefore, were at a lower risk of losing technical support due to the technology becoming obsolete. *Id.* at 3.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 4.

[31] *Id.* The GAO assumed that the AFMETCAL employee never sent any data since none was included in the agency record. *Id.*

[32] *Id.*

The agency's claim on this point was suspect at best. It would have been better to omit this point in the agency response and to proceed on the others.[33] While the GAO did not believe the agency showed the reasonableness of all of its assertions regarding fully electronic load cells, the GAO did find the decision to specify electronic load cells was reasonable on the whole and that the procurement was not the result of a lack of advance planning.[34] Thus, if an agency has not completed the proper research to support a particular belief during the acquisition planning stage, then during the protest stage, it is too late for the agency to conduct the research.

No Need to Compete Each Purchase Order Under BPAs—Competition for BPAs Meets "Maximum Extent Practicable" Requirement for Simplified Acquisitions

Given the attention that non-competitive contracts received within the last year from the Congressional Committee on Oversight, the protest in *Logan LLC*[35] seems to be very timely. Logan (referred to itself in the protest documents as Envirosolve), protested its exclusion from the rotation of purchases under a Blanket Purchase Agreement (BPA) for cleanup of hazardous waste with the Drug Enforcement Agency (DEA).[36] The protest dealt with BPAs for services in eighteen of their forty-four regions.[37] The agency had no contract vehicles in eighteen regions in 2004 and entered into ten noncompetitive BPAs for these services, although not with the protester.[38]

In March 2005, the DEA issued a request for quotations (RFQ) for hazardous waste cleanup services for twelve contract areas, contemplating the competitive establishment of one or more BPAs with various vendors for each contract area for a period up to five years.[39] The DEA notified potential offerors that actual purchase orders would be rotated amongst BPA holders for the particular contract area.[40] The DEA established a BPA with Envirosolve for nine contract areas.[41] In November of that year, the DEA requested quotations for another twenty-four contract areas, eventually signing a BPA with the protester for six of those areas.[42] This BPA also stated that actual purchase orders would be rotated amongst BPA holders.[43] In July 2006, the agency started excluding the protester from rotations after the DEA discovered hazardous chemicals buried at a site previously cleared by the protester.[44]

Envirosolve contended that the DEA's action excluding it from the rotation was in violation of the Competition in Contracting Act (CICA) and was not in accordance with applicable procurement statutes and regulations.[45] The GAO reminded the protester that simplified acquisitions are excluded from the CICA and instead require competition to the maximum extent practicable.[46] Here, the agency met this requirement by competing the original BPAs.[47] There was no further requirement to compete each individual purchase order amongst BPA holders.[48]

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[33] *Id.* at 5–6. The agency argued that the hydraulic load cells and mechanical load sensing devices were less reliable and more difficult to maintain than fully electronic load cells. *Id*. at 5. The agency also argued that when performing a technical tradeoff for performance, reliability, maintainability, and affordability, the agency must consider the extremes of environmental design requirements, the experience of equipment operators, and the harsh operating conditions. *Id*.

[34] *Id.* at 7.

[35] Comp Gen. B-294974.6, Dec. 1, 2006, 2006 CPD ¶ 188.

[36] *Id.* The opinion stated that as part of DEA's mission, it seizes illegal drug laboratories and destroys them. Part of the destruction involves the disposal of environmentally hazardous chemicals costing from $1,000 to $100,000. *Id.* Envirosolve changed its name to Logan, LLC, however, the agency refused to recognize the name change. Since both the protester and agency referred to the protester as "Envirosolve" during the course of the protest, the GAO also referred to the protester as "Envirosolve" in its decision. *Id.*

[37] The opinion stated that the agency split the country into forty-four regions and established contract vehicles for services in each. *Id.*

[38] *Id*. at 2. The protester filed a protest with the GAO and the agency agreed to take corrective action by agreeing to discontinue the issuance of purchase orders under the BPAs and to create an acquisition strategy that addressed the competition requirements. The GAO dismissed the protest. *Id*.

[39] *Id.* at 3. The solicitation stated that BPAs would be established with those responsible vendors whose quotations were determined to be technically acceptable and whose prices were found to be fair and reasonable. *Id.*

[40] *Id.* Both the RFQ and BPAs informed vendors that the issuance of the actual purchase orders would be rotated among BPA holders. *Id.*

[41] *Id*.

[42] *Id*. at 4.

[43] *Id*.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 5.

In *Exploration Partners, LLC*, the GAO determined that Space Act agreements are not "tantamount to the award of contracts for the procurement of goods and services" and therefore, were outside the GAO's jurisdiction.[49] The National Aeronautics and Space Act[50] allows the National Aeronautics and Space Administration (NASA) to enter into "an agreement under which appropriated funds will be transferred to a domestic agreement partner to accomplish an Agency mission, but whose objective cannot be accomplished by the use of contract, grant, or Chiles Act cooperative agreement."[51]

NASA created the Commercial Crew/Cargo Project to implement space exploration policy by stimulating enterprises in space, sparking private industry technology in space cargo and crew transportation in order to create cost effective, reliable access to "low-Earth orbit," and creating a market environment for both the Government and private sector.[52] NASA envisioned a two step process.[53] In the first phase, NASA would work with industry to develop and demonstrate "various space transportation capabilities" and then determine which capabilities were the most desirable to the Government and private sector.[54] The second phase was "a potential competitive procurement of orbital transportation services to resupply the [International Space Station] with cargo and crew."[55] NASA was going to provide $500 million over a four-year period, but potential firms were expected to secure additional funding.[56] The vision was that potential businesses would provide business plans describing technical approaches, anticipated costs, estimated operational prices, and business financial information.[57] The NASA announcement stated that the Funded Space Act agreements would not be governed by the Federal Acquisition Regulation (FAR) or the agency's FAR supplement "because the announcement did not provide for the award "of a contract, grant, or cooperative agreement."[58] Although the protester submitted a proposal, it was not invited for further negotiation.[59]

Exploration argued that it should have received a Space Act agreement since its proposal was the only fully funded end-to-end transportation system. In the alternative, Exploration argued that the program should have been "re-bid under the original terms and conditions without interference in obtaining Shuttle hardware, cost data or interference in commercial business relations."[60] In response, NASA argued that the agreements were not contracts but agreements issued under the "other transactions" authority of the Space Act and therefore, not subject to CICA and also not subject to the GAO's jurisdiction.[61]

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[47] *Id.*

[48] *Id.*

[49] Comp. Gen. B-298804, Dec. 19, 2006, 2006 CPD ¶ 201, at 4.

[50] 42 U.S.C. § 2473(c)(5) (2000).

> (5) without regard to section 3324(a) and (b) of title 31, to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any State, Territory, or possession, or with any political subdivision thereof, or with any person, firm, association, corporation, or educational institution. To the maximum extent practicable and consistent with the accomplishment of the purpose of this chapter, such contracts, leases, agreements, and other transactions shall be allocated by the Administrator in a manner which will enable small-business concerns to participate equitably and proportionately in the conduct of the work of the Administration.

Id.

[51] *Exploration Partners, LLC.*, Comp. Gen. B-298804, at 2.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 2–3.

[58] *Id.* at 3.

[59] *Id.* The two firms that the agency invited to negotiate were SpaceX and Rocketplane. *Id*.

[60] *Id*. (citing TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)).

[61] *Id.*

The GAO agreed that the agreements were governed by the "other transaction" authority under the Space Act, citing the statutory construction of the Act.[62] The GAO applied the principal of statutory construction whereby, if possible "no clause, sentence, or word shall be superfluous, void or insignificant," and since the act contained distinguished contracts and "other transactions," the GAO determined that the two arrangements could not be the same.[63] Because such "other transactions" are outside the GAO's protest jurisdiction, the GAO dismissed the protest.[64]

No Unlawful Bundling and Unduly Restrictive Specification Where the Agency Can Justify Bundling as the Best Method of Meeting Its Needs and Restrictive Specification is Reasonable

In *Outdoor Venture Corp.; Applied Companies*,[65] two companies protested an Army RFP for an ID/IQ contract for the Standardized Integrated Command Post System Family of Trailer Mounted Support Systems[66] (SICPS/TMSS) because they claimed the requirement was improperly bundled, the specifications were too restrictive, and the RFP gave the incumbent an unfair competitive advantage.[67] The GAO disagreed and denied the protest.[68]

The Army contemplated the award of a one-year ID/IQ fixed-price contract with four additional one-year ordering periods.[69] While the protesters could provide parts separately,[70] they could not provide all of the required products.[71] The protesters argued that the bundling of the requirement (the turnkey system as opposed to procuring the parts individually) violated the restrictions of the Small Business Act[72] and the Competition in Contracting Act (CICA),[73] and that the solicitation was unduly restrictive because it consolidated requirements while not providing enough information to submit a responsive offer or enough time for potential awardees to meet the government's time requirements for first shipment.[74] Finally, the protesters argued that the awardee, DHS Limited LLC, had an unfair competitive advantage because that firm had produced the systems for Defense Logistics Agency (DLA) under a similar contract.[75]

The GAO rejected the protesters' arguments concerning the unduly restrictive claim and improper bundling claims, and further found that the protesters were not interested parties concerning the unfair competitive advantage allegation.[76] First, the Army and both the Small Business Administration and Disadvantaged Business Utilization Specialist agreed that the requirement was not suitable for award to one or more small businesses.[77] In prior years, DLA had procured this system and the Army had ordered its requirements from DLA. However, the Army required its own contract due to its projection of increased demand and requirements exceeding the maximum ordering quantity under the DLA contract.[78] The Army needed

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[62] *Id.* at 4. The grant of authority under the Space Act distinguished between contracts and "other transactions." *Id.*

[63] *Id.*

[64] *Id.* at 6.

[65] Comp. Gen. B-299675, B-299676, July 17, 2007, 2007 CPD ¶ 138.

[66] *Id.* The opinion described the command post as a "turnkey" system previously obtained through DLA that was a "commercial-off-the shelf solution which is comprised of a controlled-environment tent, an environmental control unit (ECU) [an air conditioner] and an auxiliary power unit for the ECU." *Id*. at 2. It was used as a battlefield communications center in Iraq and Afghanistan. *Id*. at 4.

[67] *Id.* at 1. Originally, protesters included an allegation that the solicitation did not provide enough information to permit potential offerors the opportunity to submit responsive offers. *Id.* at 2. The protesters later acknowledged that the agency provided additional information in amendments to the solicitation which addressed their concern. *Id.* at 3.

[68] *Id.*

[69] *Id*. at 2.

[70] Outdoor could provide the tent and Applied could provide the environmental control unit. *Id*.

[71] *Id.*

[72] 15 U.S.C. § 631 (2000).

[73] 41 U.S.C. § 253 (2000).

[74] *Outdoor Venture Corp.*, 2007 CPD ¶ 138, at 2, 4.

[75] *Id.* at 6.

[76] *Id.* at 4, 6.

[77] *Id.* at 3.

[78] *Id.*

a reliable system, not just conglomeration of independent parts, to meet its critical system needs in Iraq and Afghanistan.[79] After reviewing the Army's justification, the GAO believed that the Army had met its burden of proving its need for a total system.[80]

The GAO found that the agency also met its burden of establishing prima facie support that the Army had a reasonable requirement for the solicitation's restrictions.[81] The protesters argued the solicitation was unduly restrictive because it unnecessarily consolidated the requirements, it did not provide enough information to allow offerors to respond, and it did not provide enough time for potential offerors to meet the Army's delivery requirement.[82] Initially, the burden is on the agency to establish prima facie support for the alleged restriction and then the burden shifts to the protester to prove that the specifications were clearly unreasonable.[83] The agency explained that it needed the systems in the field as soon as possible and since the system was comprised of commercial items, a ninety-day period from award to delivery was reasonable. The protesters failed to clearly show that the restriction was unreasonable and instead merely repeated their argument that the ninety-day delivery schedule could only be met by DHS, the incumbent.[84] The GAO did not address the unfair competitive advantage claim of the protesters since, by their own admissions, they could not submit a proposal for the solicitation and therefore, they were not interested parties and cannot challenge the alleged unfair competitive advantage.[85]

Lieutenant Colonel Ralph J. Tremaglio, III

[79] *Id*. at 4.

[80] *Id.* The Army had been warned that requiring a separate contract for additional companies to integrate its systems would jeopardize the Army's ability to purchase enough systems "in the event of a surge requirement." *Id.*

[81] *Id.*

[82] *Id.* As discussed previously, the protesters later acknowledged the agency provided additional information through solicitation amendments which rectified their concerns regarding information to potential offerors allowing them to submit responsive offers. *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 6.

Contract Types

The Authorized Use of Time-and-Materials Contracts and Labor-Hour Contracts for Commercial Services

On 12 December 2006, Federal Acquisition Circular 2005-15 issued a final rule authorizing the use of Time-and-Materials (T&M) and Labor-Hour (LH) contracts for Commercial Services.[1] The authorization to use T&M and LH contracts, under certain conditions, became effective on 12 February 2007.[2] In implementing FAC 2005-15, the Federal Acquisition Regulation (FAR) retains the preference to procure commercial items with Firm-Fixed-Price and Fixed-Price with Economic Price Adjustment contracts.[3]

A contracting officer, however, may award T&M and LH contracts for commercial services[4] if prior to soliciting a T&M or LH contract (or issuing a task order under a delivery contract) for commercial services, the contracting officer executes a determinations and findings (D&F) document certifying that no other contract type is suitable for the agency requirements, the contract or task order includes a ceiling price, and the ceiling price may only be increased by a subsequent D&F that certifies that increasing the ceiling price is in the best interests of the procuring agency.[5] The contracting officer must then follow one of three procedures under the FAR to award the contract: the Full and Open Competition procedures;[6] the Other than Full and Open Competition procedures (as long as the agency receives two or more responsible offerors that satisfy the agency requirements);[7] or ordering the commercial services under a multiple award delivery contract (as long as they follow the fair opportunity ordering procedures of FAR 16.505).[8]

Warranties Survive a Termination for Convenience in a Fixed-Price ID/IQ

In *International Data Products Corp. v. United States*,[9] the Court of Appeals for the Federal Circuit overturned the Court of Federal Claims holding that a termination for convenience of a fixed-price indefinite-delivery indefinite-quantity (ID/IQ) contract also terminates the contractor's obligation to provide warranty and upgrade services for computer equipment purchased by the government prior to the termination.[10] The Court of Appeals held that the government paid for the warranty and upgrade services when it purchased the computer equipment.[11] The contractor's obligation attached to the purchased computer equipment, and not to the contract; therefore, this obligation to perform the warranty provisions survived beyond the contract's termination for convenience.[12]

In 1995, the U.S. Air Force awarded a contract to IDP, a computer manufacturer and retailer, for the purpose of providing computers to the agency.[13] The agency awarded the contract as a set aside pursuant to Section 8(a) of the Small Business Act.[14] The contract was a fixed-price multiple award ID/IQ with a guaranteed minimum of $100,000, an estimated value of $100 million, and a maximum of $729 million.[15] After supplying over $35 million in computer equipment to the Air

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[1] Federal Acquisition Regulation, Federal Acquisition Circular 2005-15, Item II, Additional Commercial Contracts Types, 71 Fed. Reg. 74656, 74667 (Dec. 12, 2006), 2006 WL 3587719 (F.R.).

[2] *Id*.

[3] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 12.207(a) (July 2007) [hereinafter FAR].

[4] *Id*. at pt. 12.207(b)(1).

[5] *Id.* at pt. 12.207(b)(1)(ii).

[6] *Id.* at pt. 6.102; *see also id.* at pts. 13, 19.5.

[7] *Id.* at pt. 6.3.

[8] *Id.* at pt. 16.505.

[9] 492 F.3d 1317 (Fed. Cir. 2007).

[10] *Id*. at 1320.

[11] *Id*. at 1323.

[12] *Id*.

[13] *Id*. at 1320.

[14] *Id*.; *see also* Small Business Act, Pub. L. No. 85-536, 72 Stat. 384 (1958) (codified as amended in scattered sections of 15 U.S.C.).

[15] *Int'l Data Prods.Corp*., 492 F.3d at 1320–21.

Force over three years, Dunn Computer Corporation, a non-§8(a) entity, purchased IDP.[16] The Air Force requested a waiver from the Small Business Administration (SBA) to allow IDP to continue as a prime contractor on the Desktop V contract, but the SBA disapproved the request.[17] The Air Force subsequently terminated IDP for convenience on 8 October 1999.[18] After the termination, the Air Force demanded that IDP continue the warranty and upgrade services of the original contract.[19] Although IDP initially complied, by April 2000 it stopped providing any warranty and upgrade services to the computer equipment that the Air Force purchased prior to the termination.[20]

In determining whether the warranty and upgrade services for the computer equipment attached to the contract (as IDP argued) or the computer equipment purchased prior to the convenience termination (as the government argued), the Court of Appeals looked to both the language of the contract, and also to the FAR.[21] The court found that the warranty clause did not require the Air Force to pay any additional costs for the warranties on the computer equipment, implying that the warranty was "priced-in" to the costs of the computer equipment that the Air Force purchased before terminating the contract.[22] Additionally, the court found that even when the government completely terminates a fixed price contract, the FAR requires that the government retain all of the warranties that attach to the goods or services it had purchased prior to the termination.[23] As opposed to the contractual and regulatory language that supported the government's position that the warranties attached to the computer equipment, the court was unable to find any evidence that the warranties attached to the contract, and ceased upon termination.[24] As a result, the court held that the convenience termination of IDP did not extinguish the warranty services on the computer equipment that the Air Force purchased prior to the termination.[25] Finally, the court held that IDP could not recover any costs associated with their required provision of the warranty services from the Air Force, under any of the theories of recovery advanced by the contractor.[26]

Major Jose A. Cora

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[16] *Id*. at 1321.

[17] *Id*.

[18] *Id*.

[19] *Id*.

[20] *Id*.

[21] *Id*. at 1323.

[22] The Warranty Clause of the Desktop V contract stated:

> The Contractor shall provide users with a minimum 3 year, on-site, full parts and labor warranty for all offered products (excluding software) which includes CLINS 0001-0005. The Contractor shall provide users with a minimum 5 year (4 years on-site, 5th year return to IDP) full parts and labor warranty for all offered products (excluding software), for SLINS 0007AA through 0007CE. For SLINS 0007AA though 0007CE, [the] contractor shall provide a three year on site, 24 hour fix or replace on hardware warranty, and a two year upgrade warranty on software. Computer system, printers, and peripheral shall be user expandable and maintainable without voiding the Contractor provided warranty. The warranty coverage shall be worldwide and provide for no charge problem reporting 24 hours per day, 7 days per week. The warranty shall provide for repairing or replacing products (excluding software) and prompt return to customer service after problem notification.

Id. at 1322.

[23] FAR, *supra* note 3, pt. 49.603-1(b)(7). The warranty clause required for all complete terminations stated: "(7) Regardless of any other provision of this agreement, *the following rights and liabilities of the parties under the contract are reserved . . .* (v) *All rights and liabilities* of the parties, arising under the contract or otherwise, and *concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the Government by the Contractor* under the contract or this agreement." (emphasis added). *Id*.

[24] *Int'l Data Prods.Corp*, 492 F.3d at 1323.

[25] *Id*.

[26] *Id*. at 1323–26.

Sealed Bidding

Bighorn Fells Trapper

In *Bighorn Lumber Company, Inc*,[1] the Government Accountability Office (GAO) sustained a protest by a timber company and held that "[a] clerical error that is apparent on the face of a bid may be corrected by the contracting officer prior to award, if the contracting officer is able to ascertain the intended bid without the benefit of advice from the bidder."[2] The GAO further held that a "mistake can be corrected if the bidder presents clear and convincing evidence that a mistake occurred, the manner in which it occurred and the intended bid price."[3]

In this case, the Department of Agriculture's Forest Service issued a prospectus for the sale of government timber which stated that the award would be made based on "only one bid amount,"[4] described as a "weighted average minimum (WAM) bid rate."[5] The WAM is "the bid rate for the stumpage of various species of timber covered by the sale"[6] and was described in the prospectus as "the volume of each biddable species multiplied by its bid rate."[7] Since the contract involved the sale of government timber, rather than a procurement, the solicitation stated that the contract would be awarded to the bidder offering to sell at the highest price.[8]

The agency awarded the contract to Trapper Peak Timber Company ("Trapper") based on its determination that the company had made an apparent mistake in its bid that was correctable.[9] The contracting officer made a determination that there was legal justification for Trapper to correct its bid, and, as corrected, the bid was the highest.[10] As a result, the contracting officer awarded the contract to Trapper.[11] Bighorn Lumber Company, the second highest bidder, protested the agency's decision to correct Trapper's bid.[12] The agency responded "that Trapper's bid [would] be corrected to reflect the [higher] bid rate because the contracting officer found clear and convincing evidence to support that an error had been made in Trapper's bid, the manner in which it was made and Trapper's intended bid price."[13]

GAO stated the general rule of correction of mistakes as, "[a]n agency may allow a bidder to correct a mistake in its bid after bid opening when the bidder presents clear and convincing evidence that a mistake occurred, the manner in which it occurred and the intended bid price."[14] "A clerical error that is apparent on the face of a bid may be corrected by the contracting officer prior to award, if the contracting officer is able to ascertain the intended bid without the benefit of advice from the bidder."[15] Here, the contracting officer made the determination that there was, in fact, clear and convincing evidence of the intended bid; however, the bid was "not supported by worksheets or any other form of bid calculation documents. In fact, the record shows that it was not Trapper who calculated this amount, but the agency's bid official."[16]

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[1] Bighorn Lumber Co., Inc., Comp. Gen. B-299906, Sept. 25, 2007, 2007 CPD ¶ 173.

[2] *Id*. at 4 (citing SCA Servs. of Georgia, Inc., Comp. Gen. B-209151, Mar. 1, 1983, 83-1 CPD ¶ 209 at 4; G.S. Hulsey Crushing, Inc., Comp. Gen. B-197785, Mar. 25, 1980, 80-1 CPD ¶ 222, at 2).

[3] *Id*. (citing A & J Constr. Co., Inc., Comp. Gen. B-213495, Apr. 18, 1984, 84-1 CPD ¶ 443).

[4] *Id*.

[5] *Id*.

[6] *Id*. at 5 n.1.

[7] *Id*. (citations omitted).

[8] *Id.* at 2.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id*. at 3.

[14] *Id*. (citing A & J Constr. Co., Inc., Comp. Gen. B-213495, Apr. 18, 1984, 84-1 CPD ¶ 443, at 5).

[15] *Id*. at 4 (citations omitted).

[16] *Id*.

It is apparent that GAO was disappointed with the lack of evidence procured by the contracting officer. Because of this, GAO sustained the protest and recommended award to Bighorn Lumber Company.[17]

Responsiveness v. Responsibility

In its decision in *SourceLink Ohio, LLC*,[18] the GAO sustained an appeal by a protestor whose bid was rejected for a lack of responsiveness based on a failure to sign a Data Use Agreement (DUA). The Government Printing Office (GPO) provided the DUA to bidders as part of a solicitation issued on behalf of the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), for the "produc[tion] and mail[ing] of Medicare and Medicaid beneficiary notices and related documents to designated recipients."[19] The DUA "is an agreement required by CMS's policies when an external entity requests individual identifying data covered by the Privacy Act . . . . The purpose of the DUA is to secure the data that resides within the CMS Privacy Act System of Records."[20] The GPO solicitation required the bidders to submit a signed DUA, and stated: "Contractor must sign and submit with their bid a 'Data Use Agreement' to ensure the integrity, security and confidentiality of information maintained by CMS and for release of furnished data tapes."[21] Further, the solicitation stated: "Failure to complete and submit this agreement may cause the contractor to be found NON-responsive."[22]

In its submission, the protestor failed to include a completed DUA.[23] After opening the seven sealed bids, the contracting officer determined that SourceLink's bid was non-responsive because it did not include the DUA.[24] SourceLink's bid was the lowest, but since the contracting officer found it non-responsive, the contracting officer awarded to the next lowest bidder.[25] After award, SourceLink protested and argued that "the agency should not have rejected its bid as nonresponsive because the failure to submit a DUA is not a matter of responsiveness, inasmuch as a DUA need only be in place prior to the release of the CMS data to perform the contract."[26]

The general rule for responsiveness is that "a bid must be an unequivocal offer to perform without exception all the material terms and conditions of the solicitation. . . . Where a bidder provides information with its bid that does not constitute an unequivocal offer or which reduces, limits, or modifies a material requirement of the solicitation, the bid must be rejected as non-responsive."[27] Responsibility, on the other hand, "refers not to a bidder's promise to perform, but rather its apparent ability and capacity to perform the contract requirements, and is determined not at the time of bid opening, but at any time prior to award, based on any information received by the agency up to that time."[28] Here, GAO held that the contracting officer's determination that SourceLink was non-responsive was improper because the issue was one of responsibility. GAO explained "the DUA is similar to an application for a license, permit, or other approval required prior to performance, and thus can be provided any time prior to award."[29] GAO further found that the contract to the second lowest bidder should be terminated and recommended that award be made to SourceLink should CMS approve SourceLink's DUA.

Major Jennifer C. Connelly

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[17] *Id.*

[18] Comp. Gen. B-299258, Mar. 12, 2007, 2007 CPD ¶ 50.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 2 (citations omitted).

[22] *Id.* (citations omitted).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* (citations omitted).

[28] *Id.* (citations omitted).

[29] *Id.* (emphasis added); *see* Victory Van Corp.; Columbia Van Lines, Inc., Comp. Gen. B-180419, Apr. 8, 1974, 74-1 CPD ¶ 178, at 2; Midwest Sec. Agency, Inc., Comp. Gen. B-222424, Apr. 7, 1986, 86-1 CPD ¶ 345, at 2; Carolina Waste Sys., Inc., Comp. Gen. B-215689.3, Jan. 7, 1985, 85-1 CPD ¶ 22, at 2; Astro-Med, Inc., Comp. Gen. B-232633, Dec. 22, 1988, 88-2 CPD ¶ 619, at 3.

If the Proposal Is Sent Electronically, Either, Get It There by 5:00 p.m. the Day Before or Contractor Bears the Risk of Late Proposals

In today's age where e-mail is so prevalent and an almost instantaneous method of communication, the Government Accountability Office (GAO) reaffirmed the rule that if proposals are not sent by 5:00 p.m. the day prior to the time due to the agency, the contractor bears the risk. In *Symetrics Industries, LLC*,[1] the GAO denied a protest alleging the agency improperly rejected Symetrics' final proposal revision (FPR).[2]

The Air Force refused to consider the protester's FPR when the electronic version arrived in the contracting officer's e-mail inbox one minute after the designated time for submissions.[3] The Air Force requested FPRs from those offerors in the competitive range for AN/ALE-47 Countermeasures Dispensing System, pointing out certain items to be reviewed prior to each offeror's submission of its FPR.[4] The solicitation stated that FPRs could be electronically submitted to the contracting officer's e-mail address, but the agency warned that the FPRs must be received no later than 3:00 p.m. Eastern Standard Time (EST) on the day in question.[5] Any FPRs received after 3:00 p.m. would be considered late in accordance with the RFP provision and FAR 52.215-1 and would therefore not be considered.[6]

Although Symetrics sent its FPR from its offices before the 3:00 p.m. deadline, the contracting officer did not receive the e-mail in her e-mail system until 3:01 p.m.[7] At 2:58 p.m. on the final date designated for the receipt of FPRs, the president of Symetrics phoned the contracting officer to state that Symetrics had submitted its FPR via e-mail. The e-mail arrived at the contracting officer's inbox at 3:01 p.m., during the conversation.[8] There was a variety of evidence that Symmetrics' e-mail worked its way through the company's e-mail system starting at 2:54 p.m. and the base server received the email at 2:57:41 p.m., but it did not ultimately reach the contracting officer until 3:01 p.m.[9] Symetrics argued that its submission was under government control by the deadline, and that it was unreasonable to reject its FPR. The GAO rejected that reasoning stating that the FAR is clear.[10] By not submitting the proposal to the government by 5:00 p.m. the day before it was due, the contractor bore the risk (and ramifications) of a late submission.[11] Here, the contracting officer received the FPR one minute after proposals were due which clearly made it late and the GAO denied the protest.[12]

Section L Counts—Agency Not Required to Allow Offerors the Opportunity to Correct Proposals That Do Not Comply with the Clear Requirements of the Solicitation

In case you thought otherwise, the directions in Section L concerning submissions count. In *Mathews Associates, Inc.*,[13] the GAO denied a protest alleging that it was unfair or unduly burdensome to require offerors to assume the risks associated with failing to comply with clearly stated solicitation formatting requirements.[14] In preparing its proposal in *Mathews*, the

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[1] Comp Gen. B-298759, Oct. 16, 2006, 2006 CPD ¶ 154.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id*;. GENERAL SERVS. ADMIN. ET AL., FED. ACQUISITION REG. pt. 52.215-1(c)(3)1(c)(1)(ii). This provision provides "if no time is specified in the solicitation, the time for receipt is 4:30 p.m., local time, for designated Government office on the date that proposal or revision is due." *Id.* In this case, the Government did designate the time, 3:00 p.m. *Symetrics*, 2006 CPD ¶ 154, at 1.

[7] *Symetrics Indus., LLC*, 2006 CPD ¶ 154, at 3.

[8] *Id.*

[9] *Id.* Symetrics sent the email at 2:54 p.m., which then started transmitting from its mail server at 2:55:44 p.m. The intended recipient was identified and located at 2:58:30 p.m. and completed at 2:58:30 p.m. and completed at 2:58:31 p.m. returning the message "SMTP session successful." *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Comp. Gen. B-299305, Mar. 5, 2007, 2007 CPD ¶ 47.

[14] *Id.* at 1.

protester failed to follow the solicitation's requirements regarding page formatting and as a result, the agency refused to consider the proposal.[15]

The Army Communications-Electronics Life Cycle Management Command issued a request for proposals for loudspeakers and battery boxes to use in the single channel ground airborne radio system.[16] The solicitation anticipated the award of up to two fixed-price indefinite-delivery indefinite-quantity (ID/IQ) contracts for up to five years that offered the best value to the government.[17] Section L notified prospective offerors that proposals were limited to twenty-five pages and specified one-inch margins.[18] In formatting its proposal, Mathews modified the page margins to less than the one-inch prescribed in the solicitation.[19] The Agency realized this and then notified Mathews that the agency would not evaluate its offer because it violated the solicitation's formatting requirements.[20]

After the agency refused to reconsider, Mathews filed a protest alleging unreasonableness because either Mathews or the Army could have easily reformatted the proposal.[21] The protester also alleged that the formatting requirements were created as a public policy to create a level playing field and that there is no public policy reason to uphold the agency's decision not to reformat its proposal.[22] Neither of these allegations convinced the GAO. For the GAO, the question was not what the agency could do, but what the agency is required to do with an offer that is not within the agency's clear guidelines.[23] Since the agency is not required to allow the offeror to reformat a proposal if it is drafted within the agency's clear guidelines, the agency should not be required to allow the offeror to reformat its proposal when it is not drafted within the agency's clear guidelines. Consequently, the GAO denied the protest.[24]

Conditional Pricing

In a challenge to the Air Force's evaluation of its offer, the GAO sustained SunEdison, LLC's[25] protest of an RFP for construction and operation of a photovoltaic array to supply solar power to Nellis Air Force Base in Nevada.[26] The agency's goal was to reduce the unit cost of electrical service it presently paid to the local utility company; however, if the cost of the contract was more than its present cost of service, the Air Force might elect not to award.[27] The awardee was responsible for all equipment necessary to connect to the base's current electrical distribution system and for an interconnect agreement with the power company to be secured prior to award.[28] The Air Force would award to the lowest cost, technically acceptable proposal.[29]

The agency evaluated four factors on a pass/fail basis and intended to award to the offeror with the lowest cost of the technically acceptable proposals.[30] Three proposals were received and they all passed all four factors. Therefore, the determining factor was price.[31] The awardee's price was contingent upon the successful completion of a Renewable Energy

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 2. In Mathews' proposal, the top margin was .87 inches (versus 1 inch as was required), the bottom margin was .5 inches (versus 1 inch as was required), the header was .28 inches (versus .5 inches as was required), and the footer was .18 inches (versus .5 inches as was required). *Id.*

[20] *Id.*

[21] *Id.* According to the protester, any portion being more than the twenty-five pages the Army could reasonably refuse to consider. *Id.*

[22] *Id.*

[23] *Id.* at 3.

[24] *Id.*

[25] Comp. Gen. B-298583, B-298583.2, Oct. 30, 2006, 2006 CPD ¶ 168.

[26] *Id.* Photovoltaic array produces both renewable energy (solar power) and renewable energy credits. The Government understood that while the awardee would have to sell both in order to have a viable project, the government was only interested in the solar power or kilowatt-hours. *Id.* at 1–2.

[27] *Id.* at 1.

[28] *Id.* at 2. The new system was to intended to operation "in parallel" with the present electrical supply system from the local power company, Nevada Power Company. *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

Credit (REC) purchase agreement with Nevada Power.[32] While the agency argued its decision was permissible because the other offerors also contained similar contingencies on price, the GAO disagreed.[33] SunEdison's price proposal was unconditional.[34] SunEdison assumed the risk and stated so in its proposal.[35] Since the Air Force awarded to an offeror whose proposal was conditional, the GAO sustained the protest.[36]

Not Meaningful Discussions

In *Multimax Inc.*,[37] several unsuccessful offerors to the Army's proposed award of multiple ID/IQ contracts actions for worldwide Information Technology (IT) services protested at the GAO.[38] The protesters asserted that the agency failed to conduct meaningful discussions, and that the agency's evaluation of proposals and source selection were unreasonable.[39] The GAO agreed.[40] The protesters asserted that the agency applied an unreasonable "mechanistic formula" in evaluating proposed labor rates, which resulted in the Army failuring to conduct meaningful discussions.[41] The GAO sustained the protests finding that the Army failed to hold meaningful discussions because "the agency's reliance on a two-standard–deviation formula to identify 'outlier' rates—and the broad range of acceptable prices resulting from the formula" caused the agency to failed to bring to numerous other rates to the protesters' attention that reasonably should have been considered significantly overstated.[42]

The Army drafted an expansive statement of objectives for the IT services solicitation, looking for contractors to provide "a full range of IT equipment, operation, maintenance, sustainment requirements, and to analyze requirements, develop solutions and implement them."[43] The Army contemplated eight contract awards and intended generally to compete requirements among the awardees and issue task orders primarily based on fixed-price or a time-and-materials basis.[44] Offerors were required to propose fully-loaded hourly labor rates for 104 labor categories at both government and contractor sites.[45] Their rates were subject to annual escalation rates proposed by the offeror and applied to the annual estimated hourly requirements for each labor category.[46] The resulting totals were combined with annual other direct costs (ODC) as specified

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[32] *Id.* at 4. It was clear to all that in order to be viable, an awardee would have to sell both kilowatt hours and RECs to have a viable project. *Id.* at 2. The awardee made clear that it did not believe it could predict the amount at which Nevada Power would purchase the RECs. *Id.* at 5.

[33] *Id.*

[34] *Id.*

[35] *Id.* The proposal stated, "SunEdison assumes the risk of final PCPA [Portfolio Energy Credit Purchase Agreement] pricing and the final PCPA price will not [a]ffect [the price]." *Id.*

[36] *Id.*

[37] Multimax, Inc.; NCI Info. Sys., Inc.; BAE Sys. Info. Tech. LLC; Northrop Grumman Info. Tech., Inc.; Pragmatics, Inc., Comp Gen. B-298249.6, B-298249.7, B-298249.8, B-298249.9, B-298249.10, B-298249.11, B-298249.12, B-298249.13, B-298249.14, B-298249.15, B-298249.16, B-298249.17, B-298249.18, B-298249.19, B-298249.20, Oct. 24, 2006, 2006 CPD ¶ 165.

[38] *Id.* at 2.

[39] *Id.* Multimax, NCI Info. Sys., Inc.; BAE Sys. Info. Tech. LLC, and Northrop Grumman Info. Tech., Inc. also alleged the agency changed its requirements, however, this claim was denied.

[40] *Id.* at 5–6.

[41] *Id.* at 8.

[42] *Id.* at 12.

[43] *Id.* The solicitation's statement of objectives stated:

> ITES-2S contemplates services-based solutions under which contractors may be required to provide a full range of IT equipment. Therefore, end-to-end solutions to satisfy worldwide development, deployment, operation, maintenance, and sustainment requirements are included. Additionally included is support to analyze requirements, develop and implement recommended solutions, and operate and maintain legacy systems, and equipment. It is the intention of the Government to establish a scope that is broad, sufficiently flexible to satisfy requirements that may change over the period of performance, and fully comprehensive so as to embrace the full complement of services that relate to IT.

Id.

[44] *Id.* at 2–3. Even though the Army contemplated award to eight contractors, it reserved the right to make more, less, or none. *Id.*

[45] *Id.*

[46] *Id.*

in the solicitation and increased by a fixed markup proposed by each offeror for each ODC category, to yield an overall Total Proposed Contract Price (TPCP).[47]

The Army intended to make offers to those offerors whose proposals were determined to be the best value based upon: (1) mission support (with subfactors for performance-based approach, performance-based task approach, and small business participation); (2) performance risk (past performance, corporate experience, and financial; and (3) price with non-price factors significantly more important than price.[48] The agency determined sixteen of the submitted proposals had no deficiencies or weaknesses, and none were unreasonably high.[49] After a protest and subsequent corrective action, the Army awarded eleven contracts and the disappointed offerors again protested.[50] The protesters complained of problems revolving around the price evaluation methodology the Army used.[51]

In order to determine price reasonableness, the Army employed a two-step approach to evaluate labor rates, detect unbalanced pricing, and identify labor rates to question during discussions.[52] The price evaluation team compared an offeror's rate for a labor category to the independent government cost estimate rate, and "then it compared the rate to the mean of all offerors' evaluated rates for each labor category using a two-standard-deviation measure."[53] The results showed that the offerors all fell between one and three standard deviations.[54] The agency therefore determined that a price within two standard deviations was the most appropriate measure of comparison to use for reasonableness assessment.[55]

The problem is that the agency referred to the offerors labor costs and "mechanistically applied" their formula and accepted the results without further analysis.[56] The GAO determined that instead, the agency should have reviewed the results of applying their formula and sought to ensure the prices at the extreme ranges reflected reasonable pricing.[57] The two standard deviation formula the agency created resulted in a wide range of acceptable rates for labor categories.[58] Therefore, the GAO determined the agency's decision was unreasonable because this did not provide a valid means for identifying questionable rates.[59]

The GAO then determined that the Army's price discussions with three offerors were inadequate. According to the GAO the agency's reliance on the two-standard-deviation formula to identify "outlier" rates (and the broad range of acceptable prices resulting from the formula) failed to bring to the protesters' attention numerous rates that reasonably should have been considered significantly overstated.[60] During discussions, the agency failed to identify rates that significantly exceeded the IGCE, which misled offerors into believing these significantly higher rates did not require further adjusting.[61] While the agency notified several offerors that some of their proposed labor rates were significantly higher than the IGCE rates for certain labor categories, they did not reveal the agency's reliance on the standard deviation formula.[62] The offerors incorrectly, but reasonably, reached the conclusion that their rates were not significantly higher than the IGCE.[63] The GAO concluded "that not only were offerors not adequately advised of all of their significantly overstated rates, but the agency's

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[47] *Id.*

[48] *Id.* at 3.

[49] *Id.* at 3, 5. The Army received seventeen proposals and entered into discussions with all seventeen offerors; one offeror withdrew its offer. *Id.* at 3.

[50] *Id.* The Army originally awarded eleven contracts, but several of the disappointed offerors protested. The agency advised that it failed to account for all information received during discussions in its evaluation ratings for the financial subfactor under performance risk evaluation. It therefore took corrective action and the GAO dismissed the protests. *Id.*

[51] *Id.* at 8.

[52] *Id.*

[53] *Id.* Standard deviation is a statistical tool.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 11.

[57] *Id.*

[58] *Id.* at 10.

[59] *Id.* at 11.

[60] *Id.* at 12.

[61] *Id.* at 13.

[62] *Id.* at 12. The agency also recommend that the offerors consider revising the price proposal or provide an explanation for the basis of the rate. *Id.*

[63] *Id.* at 13.

failure to identify the additional rates actually misled the offerors into believing that those rates did not require further adjustment."[64] Since the offerors were unaware of the issues with their rates they did not change their final rates and therefore the discussions were misleading.[65] Since the agency did not reveal all potential issues with the protesters, the GAO found that the agency failed to conduct meaningful discussions with them.[66]

Lieutenant Colonel Ralph J. Tremaglio, III

[64] *Id.*

[65] *Id.*

[66] *Id.*

Contracting Officer Not Reasonable in Failing to Set-Aside Acquisition for Service-Disabled Veteran-Owned Small Business Concerns

In *MCS Portable Restroom Service*,[1] the Government Accountability Office (GAO) sustained a pre-award protest regarding an Air Force contracting officer's decision not to set aside a procurement for service-disabled veteran-owned small business concerns (SDVOSBCs). The GAO found that the contracting officer's decision not to set aside the procurement was unreasonable, and therefore recommended that the contracting officer conduct market research to determine whether he should set aside the procurement for SDVOSBCs on either a competitive or sole-source basis.[2]

The subject acquisition involved the provision of portable restroom services at the U.S. Air Force Academy and at Farish Memorial Park in Colorado.[3] The Air Force contracting officer in this matter conducted the procurement as a regular total set aside for small businesses.[4] Before deciding that such a set aside was appropriate, the contracting officer conducted some market research.[5] Based on her research, she found that there was no reasonable expectation of receiving offers from two or more HUBZone small business concerns or SDVOSBCs.[6] Consequently, she did not conduct this acquisition as a set aside for either HUBZone small business concerns or for SDVOSBCs.[7] Rather, the contracting officer set aside the acquisition for small businesses. The contracting officer issued a notice on the Federal Business Opportunities (FedBizOpps) website of this intent.[8]

Following the contracting officer's posting on FedBizOpps, MCS Portable Restroom Service (MCS), a SDVOSBC, filed a protest with the GAO arguing that the contracting officer should have conducted this procurement as either: (1) a set aside for SDVOSBCs on a competitive basis or (2) a sole source set aside to MCS as a SDVOSBC.[9] The GAO considered both of MCS's arguments separately.

Regarding the protester's first contention that the contracting officer should have conducted the procurement as a competitive set aside for SDVOSBCs, the GAO concluded that the protester was correct.[10] In making its determination, the GAO referred to the Small Business Administration (SBA) regulations which state, "the contracting officer should consider setting aside the requirement for 8(a), HUBZone, or [SDVOSBC] participation before considering setting aside the requirement as a small business set-aside."[11] Additionally, the GAO referred to the criteria in the Federal Acquisition Regulation (FAR)[12] for deciding whether such a set aside is appropriate.[13]

> (a) The contracting officer *may* set aside acquisitions exceeding the micro-purchase threshold for competition restricted to [SDVOSBCs] when the requirements of paragraph (b) of this section can be satisfied. The contracting officer shall consider [SDVOSBC] set-asides before considering [SDVOSBC] sole source awards . . . .
>
> (b) To set-aside an acquisition for competition restricted to [SDVOSBCs], the contracting officer must have a reasonable expectation that--
> (1) Offers will be received from two or more [SDVOSBCs]; and

[1] Comp. Gen. B-299291, Mar. 28, 2007, 2007 CPD ¶ 55.

[2] *Id*. at 7–8.

[3] *Id*. at 1.

[4] *Id*. at 2.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id*.

[9] *Id*.

[10] *Id*. at 5.

[11] *Id*. at 3. *See also* 13 C.F.R. § 125.19 (2007).

[12] *See also* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 19.1405 (a), (b) (July 2007) [hereinafter FAR].

[13] *MCS Portable Restroom Serv.*, 2007 CPD ¶ 55, at 3.

(2) Award will be made at a fair market price.[14]

The GAO further explained that while the contracting officer has discretion in deciding whether a set aside for SDVOSBCs is appropriate, that discretion is limited by reasonableness.[15]

Significantly, the GAO found that the contracting officer's decision in the instant case was not reasonable.[16] The GAO arrived at this conclusion after considering the SBA's opinion in light of the facts of this case. Notably, the SBA found the contracting officer's actions unreasonable in that while two SDVOSBCs expressed interest in the acquisition (MCS and a Florida-based SDVOSBC), the contracting officer disregarded the Florida firm.[17] The SBA was also disappointed that the contracting officer did not seek the advice of the SBA in this matter prior to issuing the solicitation as a total set aside for small businesses. In brief, the GAO stated that, "we conclude that the Air Force failed to make reasonable efforts to ascertain whether this acquisition was suitable for [a competitive] SDVOSBC set-aside."[18]

Regarding the protester's second contention that the contracting officer should have conducted the procurement as a sole source SDVOSBC set aside (to MCS), the GAO concluded again that the Air Force contracting officer's decision was not reasonable.[19] Specifically, the contracting officer believed that in this case a sole source set aside was impermissible when, in fact, it was permissible.[20] On this point, the GAO explained that while a literal reading of the FAR could lead a contracting officer to suppose that a sole source award to a SDVOSBC was impermissible in this case, the Veteran's Benefit Act of 2003 would permit such an award.[21] The GAO reasoned that the FAR should be read harmoniously with the foregoing statute. As such, a sole source award was, in fact, permissible. The GAO concluded that the Air Force "did not reasonably exercise its discretion in determining whether this acquisition was appropriate for award on a sole-source basis to an SBVOSBC because it erroneously believed that the FAR precluded such an award."[22]

Therefore, based upon the foregoing reasons, the GAO sustained the protest. The GAO further recommended that the contracting officer conduct additional market research to determine whether this procurement should be conducted as either a competitive set aside for SDVOSBCs or rather, as a sole source set aside.[23]

Not So Fast . . . Contracting Officer Cannot Award While Size Status Protest Pending

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[14] *See* FAR, *supra* note 12, at pt. 19.1405.

[15] *MCS Portable Restroom Serv.*, 2007 CPD ¶ 55, at 3–4.

[16] *Id.*

[17] *Id.* at 4. The SBA criticizes the contracting officer's summary disregard of the Florida firm merely because it did not express interest (to the contracting officer) a second time following the contracting officer's public posting of a second query regarding interest in the service. *Id.*

[18] *Id.* at 5.

[19] *Id.* at 8.

[20] *Id.* at 7.

[21] *Id.* at 6; *see also* 15 U.S.C. § 657f (2000). FAR, *supra* note 12, pt. 1406(a) states that a contracting officer may award a contract to a SDVOSBC on a sole source basis if "only one SDVOSBC can satisfy the requirement." *MCS Portable Restroom Serv.*, 2007 CPD ¶ 55, at 6–7. The Air Force contracting officer contended that because more than one SDVOSBC existed that could perform the requirement, a sole source award would be improper. *Id.* FAR, *supra* note 12, pt. 19.1406(a) states in pertinent part:

> (a) A contracting officer may award contracts to [SDVOSBCs] on a sole source basis . . . provided—
>
> (1) Only one [SDVOSBC] can satisfy the requirement; [and]
>
> (2) The anticipated award price for the contract (including options) will not exceed—
>
> (i) $5.5 million for a requirement within the NAICS codes for manufacturing; or
>
> (ii) $3 million for a requirement within any other NAICS code; [and]
>
> (3) The [SDVOSBC] has been determined to be a responsible contractor with respect to performance; and
>
> (4) Award can be made at a fair and reasonable price.

See FAR, *supra* note 12, at pt. 19.1406(a).

[22] *MCS Portable Restroom Serv.*, 2007 CPD ¶ 55, at 8.

[23] *Id.*

In *Alliance Detective & Security Serv., Inc.*,[24] the GAO sustained a protest in a case with a complicated procedural history. Prior to the protester's filing this GAO protest, the SBA considered two pre-award protests and one post-award size status protest in a small business set aside procurement.[25] In sustaining the GAO protest, the GAO concluded that the contracting officer improperly awarded two contracts to a business that was not "small" under the Small Business Act[26] and as such, the firm was ineligible for award.[27] Although the GAO did not recommend that the agency terminate the subject contract, it did recommend that the agency not exercise any of the contract options.[28]

On 4 April 2006, a Department of Homeland Security (DHS) contracting officer issued, as small business set asides, two requests for proposals (RFPs) for security guard services in Massachusetts, Rhode Island, and Connecticut.[29] In response, DHS received twenty-one proposals including one from the protester, Alliance Detective & Security Systems (Alliance), one from American Sentry, and one from C&D Security Management, Inc. (C&D).[30] After the contracting officer notified the offerors that DHS intended to award both contracts to C&D, both American Sentry and Alliance filed size status protests with the contracting officer.[31] Five days after receiving the second protest the contracting officer forwarded both size status protests to the SBA.[32] Before forwarding these protests to the SBA, the contracting officer awarded the two contracts to C&D.[33]

The SBA considered both size status protests separately.[34] On 3 October 2006, the SBA dismissed Alliance's protest because it was not sufficiently specific.[35] On 13 October 2006, in reviewing American Sentry's protest, the SBA found C&D was "other than small"[36] under the SBA and was ineligible for award.[37]

Following the SBA's decision that C&D was not a small business, a number of key events occurred. On 23 October 2006, the contracting officer notified the awardee, C&D, that it was suspending performance of the contract pending the resolution of the size status protests.[38] Then C&D appealed the SBA's determination to the SBA's Office of Hearings and Appeals (OHA).[39] After considering this appeal, the OHA granted C&D's appeal finding that American Sentry's protest was not sufficiently specific and so was not a proper protest.[40] As a result, on 21 November 2006, the OHA "vacated" the SBA's earlier determination that C&D was "other than small."[41] Dissatisfied with this outcome, on 28 November 2007, the Area Director of the SBA filed yet another size status protest arguing that "even though OHA had vacated the earlier SBA determination [finding that C&D was not small] for procedural reasons, the OHA's decision would not and did not change the financial structure or size of C&D as other than small."[42] Consequently, on 14 December 2006, the SBA issued its decision on the Area Director's protest finding once again that C&D was "other than small."[43] The SBA forwarded this final size status determination to DHS on 15 December 2006.[44]

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[24] Comp. Gen. B-299342, Apr. 13, 2007, 2007 CPD ¶ 56.

[25] *Id.* at 2–6.

[26] 15 U.S.C. §§ 631–657a.

[27] *Alliance Detective & Sec. Serv.*, 2007 CPD ¶ 56, at 7.

[28] *Id.*

[29] *Id.* at 2.

[30] *Id.*

[31] *Id.* at 2–3.

[32] *Id.*

[33] *Id.* at 3.

[34] *Id.*

[35] *Id.*

[36] *Id.* The SBA based this finding on C&D annual receipts which exceeded the size standard of for this acquisition which was $11.5 million. *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 4.

[42] *Id.*

[43] *Id.* at 5.

[44] *Id.*

After DHS replied to the SBA that it did not intend to terminate its contracts with C&D, Alliance filed the instant GAO protest.[45] Alliance argues that DHS should terminate both of its contracts with C&D because C&D is not a small business under the SBA and was therefore, ineligible for both award in a small business set asides.[46]

In considering Alliance's protest, the GAO referenced the applicable small business regulations.[47] In particular, one SBA provision states, "[a] timely filed [SBA] protest applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the protest."[48] Additionally, the GAO referred to a relevant FAR provision which states:

> After receiving a [size] protest involving an offeror being considered for award, the contracting officer *shall not* award the contract until (i) the SBA has made a size determination or (ii) 10 business days have expired since SBA's receipt of a protest, whichever comes first; however, award shall not be withheld when the contracting officer determines in writing that an award must be made to protect the public interest (emphasis added).[49]

While FAR 19.302(h)(1) requires that a contracting officer receiving a size status protest withhold award for the period stated in the provision, in the instant case, the GAO noted that the DHS contracting officer improperly awarded the contracts to C&D.[50] After receiving two size status protests, the contracting officer awarded both contracts to C&D without waiting either ten business days or waiting for SBA's decisions on the protests.[51] Specifically, the contracting officer awarded the contracts within five days after receiving the second protest and before the SBA had issued its decisions on the size status protests.[52] Additionally, the contracting officer made no determination that contract award was necessary to protect the public interest.[53] Significantly, the GAO reasoned that even though these protests were later found to be procedurally defective,[54] those findings do not transform the improper awards into proper awards.[55] Moreover, because the protest that the SBA filed later filed on 28 November 2006 was not only timely, but also resulted in a finding that C&D was not small, that determination applies to the procurement in question.[56]

Thus, the GAO concluded that the award of the two contracts to C&D was improper because the contracting officer failed to follow the FAR requirement that the contracting officer withhold award for the prescribed time period.[57] The GAO's opinion hinges upon two key events. First, the contracting officer failed to follow the small business regulations by improperly awarding contracts to C&D after receiving two pending size status protests. Second, after reviewing the Area Director's timely size status protest, the SBA determined that C&D was not a small business. Hence, for the foregoing reasons, the GAO found that award to C&D was improper and sustained Alliance's protest.[58]

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[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*; *see also* 13 C.F.R. § 121.1004(c) (2007). The SBA found both protests filed by Alliance and American Sentry to be timely under the SBA regulations; the SBA's post-award protest was also timely. *Alliance Detective & Sec. Serv.*, 2007 CPD ¶ 56, at 3–4.

[49] *See* FAR, *supra* note 12, at pt. 19.302(h)(1).

[50] *Alliance Detective & Sec. Serv.*, 2007 CPD ¶ 56, at 6–7.

[51] *Id.* FAR, *supra* note 12, at pt. 19.302(h)(1) (stating that in a small business set aside, after the contracting officer receives a protest, the contracting officer may not award the contract until: "(i) the SBA has made a size determination or (ii) 10 business day s have expired since SBA's receipt of a protest, which ever occurs first . . . ")

[52] *Id.*

[53] *Id.*

[54] The SBA found that Alliance's protest was not sufficiently specific and as such, dismissed the protest. *Id.* at 3. Similarly, the OHA found that American Sentry's protest was not sufficiently specific and then vacated the SBA's determination that C&D was "other than small." *Id.* at 4.

[55] *Id.*

[56] *Id.* at 6–7. FAR, *supra* note 12, at pt. 19.302(h)(1).

[57] *Id.*

[58] *Id.* at 7.

While the GAO could have recommended that DHS terminate its contracts with C&D, it did not.[59] The GAO did, however, recommend that DHS not exercise any of the options under the contracts. Additionally, the GAO recommended that DHS re-solicit the services covered by the contracts for a period commencing after the expiration of the existing contracts.[60]

DOD Price Evaluation Adjustment for Small Disadvantaged Businesses Still Suspended

As in previous years, the Department of Defense (DOD) has again suspended the price evaluation adjustment for small disadvantaged businesses (SDBs) pursuant to 10 U.S.C. § 2323(e).[61] This statute generally allows a contracting officer from the DOD, the U.S. Coast Guard or the National Aeronautics and Space Administration (NASA) to award contracts to SDBs for up to 10% more than fair market price.[62] The statute also requires the Secretary of Defense to make an annual determination of whether DOD has met its SDB contracting goal for the prior fiscal year as described in 10 U.S.C. § 2323(a).[63] If DOD has met that goal, then the Secretary of Defense must suspend this price evaluation adjustment for one year as described in implementing regulations.[64] On 9 February 2007, based on data from fiscal year 2006, the Undersecretary of Defense made the determination that the "DoD exceeded the five percent goal . . . for contract awards to SDBs. Accordingly, the use of the price evaluation adjustment prescribed in FAR 19.11 and DFARS part 219.11 is suspended for the DoD."[65]

The statute's price evaluation adjustment is only authorized for the DOD, NASA, and the U.S. Coast Guard. The adjustment is not available for civilian agencies.[66] Additionally, the aforementioned suspension of the price evaluation adjustment only applies to DOD so, NASA and the Coast Guard may still use the adjustment in their evaluation of offers submitted by SDBs.[67]

Major Marci A. Lawson

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[59] *Id.*

[60] *Id.*

[61] Memorandum, Shay D. Assad, Director, Defense Procurement and Acquisition Policy, to Directors of Defense Agencies, subject: Class Deviation and Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses (8 Feb. 2007) [hereinafter Assad Memorandum]. This memorandum suspended the price evaluation adjustment from 10 March 2007 to 9 March 2008. *Id.*

[62] 10 U.S.C. § 2323(e) (2000). The purpose of this price evaluation adjustment is to facilitate the achievement of the goal of awarding at least five percent of the value of federal contracts to small disadvantaged businesses. *Id.*

[63] *Id.* The "SDB contracting goal" is the goal described in the preceding footnote.

[64] *See* FAR, *supra* note 12, at pt. 19.11 for an explanation of the details regarding the application of price evaluation adjustments to offers from small disadvantaged business concerns. Ultimately, the Department of Commerce is responsible for determining which industries are eligible for the price preference and the specific price adjustment factor preferences to be given to each industry.

[65] Assad Memorandum, *supra* note 61.

[66] *See* FAR, *supra* note 12, at pt. 19.11.

[67] Assad Memorandum, *supra* note 61.

Required Sources

Javits-Wagner-O'Day (JWOD) Required Source Program Changes Name, But Maintains Same Mission

The Committee for Purchase from People Who Are Blind or Severely Disabled is a federal agency that administers the JWOD program.[1] The program's "mission is to provide employment opportunities for people who are blind or have other severe disabilities in the manufacture and delivery of products and services to the federal government."[2] When purchasing supplies and services, government buyers must use JWOD as a priority source before buying from Federal Supply Schedules or other commercial sources.[3]

Effective 27 November 2006, the JWOD is now known as AbilityOne.[4] According to a Federal Register notice, the "name of the program is being changed . . . to give a stronger, more unified identity to the program and to show a connection between the program name and the abilities of those who are blind or have other severe disabilities."[5] The notice notes that "JWOD" will remain as part of the program name for "at least 18 months," and mentions no changes to the program's mission.[6] There also is no reason for buying agents and their legal advisors to believe that the name change will affect the program's place as a priority in the Federal Acquisition Regulation.

Buy American Act No Longer Applies to Acquisitions of IT Commercial Items

As of 28 September 2006, the FAR "authorizes an exception to the Buy American Act for acquisitions of information technology that are commercial items."[7] When buying "[i]nformation technology that is a commercial item,"[8] "the contracting officer may acquire a foreign end product without regard to the restrictions of the Buy American Act."[9] This is significant, as it opens up more sources of commercial IT to government buyers.

[1] *See generally* The Committee for Purchase from People Who Are Blind or Severely Disabled, http://www.abilityone.gov/jwod/index.html (last visited Jan. 22, 2008).

[2] *Id.*

[3] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 8.002(a) (Dec. 2007) [hereinafter FAR]; *see also id.* at 8.700–716.

[4] Committee for Purchase from People Who Are Blind or Severely Disabled, 71 Fed. Reg. 68,492 (Nov. 27, 2006) (codified at 41 C.F.R. pts. 51-1, 51-2, 51-3, 51-4, 51-6).

[5] *Id.* (summary)

[6] *Id.* at 68,493 (supp. info.).

[7] Exception to the Buy American Act for Commercial Information Technology, 71 Fed. Reg. 57,382 (Sept. 28, 2006) (codified at 48 C.F.R.§ 25.103(e)). The Buy American Act generally requires government purchasers to buy from American sources. Buy American Act, 41 U.S.C. § 10a (LEXIS 2008).

[8] FAR, *supra* note 4, at 25.103(e).

[9] *Id.* at 25.103.

Interested Party—Really, Submit an Offer. Seriously . . .

The Court of Federal Claims (COFC) determined that a protest timely filed with the Government Accountability Office (GAO) does not ensure that a protestor qualifies as an interested party in a subsequent protest to the COFC.[1] The COFC exercises jurisdiction over protests under the Tucker Act, as amended by the Administrative Dispute Resolution Act (ADRA) of 1996.[2] The Tucker Act grants the COFC power to:

> [R]ender judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.[3]

An "interested party" is defined as "an actual or prospective bidder or offeror" who has a direct economic interest in the procurement.[4] The COFC considered the effect of a prior GAO protest on interested party status in *Shirlington*.[5]

In 2006, the Department of Homeland Security (DHS) restructured its transportation plan and decided to procure comprehensive transportation services through contract.[6] The transportation services included shuttle bus transport between DHS offices and executive sedan transport for VIPs.[7] After reviewing results obtained from a Request for Information, the DHS determined that an insufficient number of capable Historically Underutilized Business Zone (HUBZone) businesses existed for a HUBZone set-aside.[8] Nevertheless, sufficient numbers of capable small businesses existed, and the DHS conducted the procurement as a regular small business set-aside.[9] Shirlington Limousine & Transportation, Inc. (Shirlington), a HUBZone business and the incumbent contractor performing an existing shuttle service contract, timely protested to the GAO that the procurement should be conducted as a HUBZone set-aside.[10] While the protest was pending, the offer due date came, and Shirlington submitted its offer to an incorrect location.[11]

When the DHS responded to Shirlington's GAO protest by challenging Shirlington's standing because it had not submitted an offer, Shirlington learned that it had submitted its offer to the wrong location.[12] Shirlington then filed another GAO protest challenging the DHS rejection of its offer as late.[13] The GAO denied both protests; Shirlington then filed its

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[1] Shirlington Limousine & Transp., Inc. v. United States, 77 Fed. Cl. 157 (2007).

[2] Tucker Act, Pub. L. No. 104-320, §§ 12(a), (b), 110 Stat. 3870 (1996) (LexisNexis 2008).

[3] *Shirlington Limousine & Transp., Inc.*, 77 Fed. Cl. at 164 (quoting 28 U.S.C. § 1491(b)(1) (2000)).

[4] *Id*. (citing Rex Serv. Corp. v. United States, 448 F.3d 1305, 1307 (Fed. Cir. 2006) ("[T]he term 'interested party' [in the Tucker Act is] . . . synonymous with 'interested party,' as defined by the Competition in Contracting Act, 31 U.S.C. § 3551.")).

[5] *Id.*

[6] *Id.*

[7] *Id*. at 159.

[8] *Id*. at 160.

[9] *Id*.

[10] *Id*. at 161. The GAO decided Shirlington's initial protest on 13 March 2007. Shirlington Limousine & Transp., Comp. Gen. Inc., B-299241, 2007 CPD ¶ 52 (Mar. 13, 2007). Shirlington protested:

> [T]hat the solicitation is unduly restrictive of competition because it requires the secured [vehicle] storage facility to be accessed by an electronic access system, that the contractor supply sedans, and that all shuttle buses be equipped with wheelchair lifts. Shirlington also asserts that the solicitation, issued as a small business set-aside, instead should have been set aside for Historically Underutilized Business Zone (HUBZone) small business concerns.

Id. The GAO denied the protest finding that the DHS justified its requirements and its decision to conduct the procurement as a small business set aside rather than a HUBZone small business set aside. *Id*.

[11] *Shirlington Limousine & Transp., Inc.*, 77 Fed. Cl. at 162. The solicitation as originally issued listed two separate addresses for offer delivery in two separate sections of the solicitation. *Id*. at 160, 161. Prior to the offer due date, the DHS issued an amendment responding to a question clarifying to which of the two locations must be delivered. *Id*. at 161. Shirlington delivered its offer to the incorrect location the morning offers were due. *Id*. at 162.

[12] *Id*.

[13] *Id*. at 163. The GAO denied this protest by Shirlington, finding that Shirlington's late offer submission was not caused by the agency. Shirlington Limousine & Transp., Inc., Comp Gen. B-299241.2, Mar. 30, 2007, 2007 CPD ¶ 68, at 1.

protest at the COFC, requesting a temporary restraining order and preliminary injunction, as well as seeking adjudication on the merits.[14]

As stated above, to be an interested party with standing to protest, the protestor must be either an actual or a prospective offeror. Shirlington argued that it was a prospective offeror because it had filed a timely protest with the GAO challenging the solicitation terms, thus preserving its prospective offeror status.[15] The COFC held otherwise.[16] Once the deadline for receipt of offers has passed, so has the opportunity to be a prospective offeror.[17] The COFC relied on a Court of Appeals for the Federal Circuit (CAFC) case from 2006, *Rex Service Corporation v. United States*,[18] which held that filing an agency protest prior to the deadline for receipt of offers did not maintain prospective offeror status.[19] As the COFC stated in *Shirlington*, "the relevant principle [is] that a timely *pre-award* protest submitted to GAO does not confer plaintiff standing to later bring a protest in the United States Court of Federal Claims."[20] The COFC also quoted approvingly the government's argument that Shirlington chose the forum for its protest and it "must bear the consequences of that choice."[21]

Subject Matter Jurisdiction—Task Orders

The COFC appears to have settled the debate[22] regarding protest jurisdiction over orders placed under indefinite-delivery, indefinite-quantity (ID/IQ) contracts in *IDEA International, Inc. v. United States*[23] (*IDEA*). Judge Wheeler determined in *IDEA* that the COFC has jurisdiction over protests filed regarding task orders placed under General Service Administration (GSA) Federal Supply Schedule (FSS) contracts.[24] Prior case law provided inconsistent opinions regarding such jurisdiction, but had not addressed the issue squarely.[25] *IDEA* seems to provide a final determination at the COFC that jurisdiction exists over protested FSS task orders but not non-FSS ID/IQ contract orders.

The Federal Acquisition Streamlining Act (FASA)[26] removed bid protest jurisdiction over task orders placed against ID/IQ contracts.[27] Nevertheless, interpretation of the jurisdictional limits continues to evolve. In the 2006—Year in Review,[28] we discussed two COFC cases addressing this jurisdictional issue in *Group Seven Associates v. United States*[29] (*Group Seven*) and *A&D Fire Protection, Inc. v. United States* (*A&D*).[30] The *A&D* court addressed the FASA bar as applied to non-FSS ID/IQ contracts, and determined that the FASA does indeed bar protest jurisdiction over task orders placed under such contracts.[31] The *Group Seven* court addressed an order placed under an FSS ID/IQ contract, and while stating that "jurisdiction is doubtful,"[32] nonetheless decided the case.[33] Closing out fiscal year (FY) 2006, it was reasonably clear that the FASA bars protests of non-FSS orders, but jurisdiction over orders placed under FSS contracts was as murky as ever.

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[14] *Shirlington Limosine & Transp., Inc.* v. United States, 77 Fed. Cl. 157, 163 (2007).

[15] *Id.* at 166, 167.

[16] *Id.* at 167.

[17] *Id.*

[18] Rex Serv. Corp. v. United States, 448 F.3d 1305 (Fed. Cir. 2006).

[19] *Shirlington Limousine & Transp.*, Inc., 77 Fed. Cl. at 167. *Rex* was discussed in last year's Year in Review. Major Andrew S. Kantner et al., *Contract and Fiscal Law Developments of 2006—Year in Review*, ARMY LAW., Jan. 2007, at 62.

[20] *Shirlington Limousine & Transp.*, Inc., 77 Fed. Cl. at 167.

[21] *Id.*

[22] *See generally* Kantner et al., *supra* note 19, at 64, 65.

[23] IDEA Int'l, Inc. v. United States, 74 Fed. Cl. 129 (2006).

[24] *Id.* at 130.

[25] *Id.* at 136; *see also* Kantner et al., *supra* note 19, at 64, 65.

[26] Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10 U.S.C. and 41 U.S.C.).

[27] The FASA ID/IQ provisions are codified identically at 10 U.S.C. § 2304a–2304d and 41 U.S.C. § 253h–253k.

[28] Kantner et al., *supra* note 19, at 64, 65.

[29] Group Seven Assocs., LLC v. United States, 68 Fed. Cl. 28 (2005).

[30] A&D Fire Prot., Inc. v. United States, 72 Fed. Cl. 126 (2006).

[31] *Id.* at 134.

[32] *Group Seven Assocs. LLC*, 68 Fed. Cl. at 32.

Early in FY 2007, the COFC decided *IDEA*.[34] In this case, the Department of Defense Education Activity (DODEA) awarded a contract to ICATT Consulting, Inc. (ICATT) on 7 August 2006 under a Request for Quotations (RFQ) issued to GSA FSS contract holders.[35] The contract was intended to provide a home school program for Department of Defense (DOD) dependents outside the United States.[36] IDEA International, Inc. (IDEA) protested the award to the Government Accountability Office (GAO).[37] When DODEA chose to proceed with contract performance despite the protest, IDEA filed its protest in the COFC.[38] The government moved to dismiss two counts of the protest arguing that the COFC lacked jurisdiction over task order contracts.[39]

Judge Wheeler analyzed the FASA, the Federal Acquisition Regulation (FAR), and the case law addressing task order protest jurisdiction and concluded that the COFC maintains jurisdiction over task orders placed under FSS contracts despite the FASA.[40] First, the FASA task order protest prohibition states that it "'applies to task and delivery order contracts *entered into under sections 2304a and 2304b of this title*.'"[41] Sections 2304a and 2304b of Title 10, United States Code, provide authority to enter into ID/IQ contracts; but, authority for the FSS system and its ID/IQ contracts existed prior to, and is authorized separately from, sections 2304a and 2304b.[42] The FASA also states "that '[n]othing in this section may be construed to limit or expand any authority of the head of an agency or the Administrator of General Services to enter into schedule, multiple award, or task order or delivery order contracts under any other provision of law.'"[43] Thus, the COFC determined that the language of the FASA itself indicates that FSS contracts remain separate and unaffected by the protest jurisdiction bar.[44]

Judge Wheeler next considered the FAR treatment of ID/IQ contracts.[45] The FAR addresses generic indefinite delivery contracts in Subpart 16.5.[46] This subpart contains the FASA protest bar, but distinguishes FSS contracts stating that the FSS is governed by Subpart 8.4 and Part 38.[47] Thus, the procurement regulations recognize that the FASA protest bar does not extend to FSS orders.[48]

Finally, Judge Wheeler analyzed the inconsistent case law, and determined that, "while not entirely uniform, [it] supports the above statutory and regulatory interpretation."[49] Of COFC cases, Judge Wheeler relied on *Labat-Anderson Inc. v. United States*,[50] the 2001 case with which *Group Seven* disagreed, finding that the FASA does not bar protests regarding task orders

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[33] *Id*.

[34] IDEA Int'l Inc. v. United States, 74 Fed. Cl. 129, 129 (2006).

[35] *Id*. at 132.

[36] *Id*. at 134.

[37] *Id.*

[38] *Id*.

[39] *Id*. at 135.

[40] *Id*. at 137.

[41] *Id*. at 135 (quoting 10 U.S.C. § 2304c (f) (2000)) (emphasis added by court). Section 2304a of Title 10 United States Code (U.S.C.) provides, in pertinent part,

> Task and delivery order contracts: general authority
>
> (a) Authority to award. Subject to the requirements of this section, section 2304c of this title [10 USCS § 2304c], and other applicable law, the head of an agency may enter into a task or delivery order contract (as defined in section 2304d of this title [10 USCS § 2304d]) for procurement of services or property.

10 U.S.C. § 2304a(a). Section 2304b of Title 10, U.S.C., provides similar authority to "enter into a task order contract . . . for procurement of advisory and assistance services." 10 U.S.C. § 2304b(a)(1).

[42] *IDEA Int'l Inc.*, 74 Fed. Cl. at 135.

[43] *Id*. (quoting 10 U.S.C. § 2304a (g)).

[44] *Id.* at 135.

[45] *Id*. at 135, 136.

[46] *Id*.

[47] *Id*. at 136.

[48] *Id*.

[49] *Id*.

[50] 50 Fed. Cl. 99 (2001).

under FSS contracts.[51] Judge Wheeler also cited to the GAO case law reaching the same conclusion.[52] The GAO has asserted jurisdiction over FSS orders since 1997.[53] The court rejected the Government reliance on *A&D* and *Group Seven*.[54] First, the *A&D* court was not presented with an FSS contract order, thus its holding was limited to non-FSS contracts.[55] Second, the *Group Seven* court exercised jurisdiction even while professing its doubt that jurisdiction existed.[56] Judge Wheeler concluded by stating that,

> [t]o the extent that the discussion of jurisdiction in *A&D* and *Group Seven* might be regarded as inconsistent with the holding here, the Court finds that Labat-Anderson and Severn are more in line with the cited provisions of FASA and FAR, and that FASA's prohibition on bid protests does not cover GSA Federal Supply Schedule orders. Therefore, the Court possesses subject matter jurisdiction under the Tucker Act to review this protest.[57]

To the extent a COFC case can provide a definitive answer, *IDEA* appears to have settled the issue regarding jurisdiction over protests of task orders placed under FSS contracts.

Timeliness: Solicitation Errors and Consistency

After discussing the COFC case of *Transatlantic Lines v. United States*[58] in the 2006—Year in Review,[59] this year, the CAFC joined the fray. Last year we said, "[*Transatlantic*] appears to continue a trend that the COFC is moving further away from the GAO timelines in bid protest actions"[60] because the COFC had declined to follow the GAO rule that protests regarding solicitation improprieties be filed prior to bid opening or the due date for receipt of proposals.[61] This year, the CAFC ended the trend and added consistency to bid protest timeliness rules.

In *Blue & Gold, Fleet, L.P. v. United States*,[62] the CAFC faced an issue of first impression as described in pertinent part:

> [Whether] a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.[63]

The CAFC held that its jurisdictional statute evidences intent in favor of recognizing just such a waiver rule.[64] This holding appears to settle protest timeliness in solicitation error cases.

In *Blue & Gold*, the National Park Service (Park Service) solicited ferry transportation and other services to support Alcatraz Island.[65] Blue & Gold Fleet, L.P. (Blue & Gold) was the incumbent ferry transportation contractor, but received the second-highest score for its proposal in the instant procurement.[66] The Park Service awarded the contract to the highest

[51] *IDEA Int'l Inc.*, 74 Fed. Cl. at 136.

[52] *Id.* (citing Severn Cos., Inc., Comp. Gen., B-275717, Apr. 28, 1977, 97-1 CPD ¶ 181).

[53] *IDEA Int'l Inc.*, 74 Fed. Cl. at 136.

[54] *Id.* at 137.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] Transatlantic Lines LLC v. United States, 68 Fed. Cl. 48 (2005).

[59] Kantner et al., *supra* note 19, at 66, 67.

[60] *Id.*

[61] *Id.*

[62] 492 F.3d 1308 (2007).

[63] *Id.* at 1313.

[64] *Id.*

[65] *Id.* at 1311.

[66] *Id.*

scored proposal, and Blue & Gold protested to the GAO.[67] Due to "concerns about the GAO jurisdiction,"[68] Blue & Gold also filed a protest in the COFC; GAO then dismissed the protest because of the COFC action.[69]

Blue & Gold asserted that the awardee failed to comply with the Service Contract Act (SCA)[70] in setting its wages and benefits, and that this failure allowed the awardee's proposal to offer better incentives to the Park Service.[71] Despite Blue & Gold's argument that the Park Service improperly *evaluated* the awardee's proposal, the COFC determined that Blue & Gold was protesting the *solicitation*.[72] The Park Service is required to evaluate proposals consistent with the solicitation, and the solicitation did not require offerors to comply with the SCA.[73] Therefore, argument regarding failure to apply the SCA implicates the solicitation, not the evaluation.[74]

Blue & Gold appealed the COFC decision to the CAFC.[75] The CAFC affirmed the COFC decision, requiring that protestors that encounter patent defects in the solicitation must raise those defects prior to the bid opening or due date for receipt of proposals.[76] The CAFC began its analysis with its protest jurisdiction.[77] In addition to providing "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency," the statute requires that the COFC "give due regard to . . . the need for expeditious resolution of the action."[78] The CAFC determined that recognizing a waiver rule regarding solicitation errors furthers this statutory mandate.[79]

The CAFC also looked to patent ambiguity issues in other areas of government contract law.[80] For example, if a contract contains a patent ambiguity, the contractor will not be entitled to additional recovery because it should have raised the issue with the government prior to bidding.[81] The CAFC determined that the absence of a waiver rule allows a contractor to take advantage of the government and other bidders.[82] The court found further support for its waiver rule by looking to the GAO protest regulation, which "requires that '[p]rotests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.'"[83] Unfortunately, the CAFC did not explicitly address any recent COFC cases in which the court did not apply the waiver doctrine to determine if factual differences would still lead to the same result.[84]

The COFC followed *Blue & Gold* in *Moore's Cafeteria Services v. United States*.[85] In this case, the Department of the Army (Army) solicited for food services at Fort Campbell, Kentucky.[86] The Army awarded the contract to the Kentucky

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[67] *Id.*

[68] *Id.* at 1312.

[69] *Id.*

[70] Service Contract Act, 41 U.S.C. §§ 351-358 [hereinafter SCA].

[71] *Blue & Gold, Fleet, L.P.*, 492 F.3d at 1313. One of the evaluation factors was the franchise fee the awardee would provide back to the National Park Service (Park Service). *Id.* at 1311. By not complying with the SCA, the awardee could lower its wages and benefits, and bid a lower amount while still providing a higher franchise fee to the Park Service. *Id.*

[72] *Id.* at 1313.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 1310.

[76] *Id.* at 1313.

[77] *Id.*

[78] *Id.* (quoting 28 U.S.C. § 1491(b)).

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 1314 (quoting 4 C.F.R. § 21.2(a)(1) (2006)).

[84] *See, e.g.*, Transatlantic Lines LLC v. United States, 68 Fed. Cl. 48 (2005). In that case, the COFC justified its decision not to follow the solicitation error timeliness rule in the GAO regulations because the solicitation error constituted a statutory violation. *Id.* at 53. In *Blue & Gold*, the solicitation error also involved a statutory violation: failing to apply the SCA to the contract. *Blue & Gold Fleet, L.P.*, 492 F.3d at 1312. Again, the CAFC did not address this issue specifically to analyze whether any factual differences may justify the disparate results or *Blue & Gold* overturns *Transatlantic Lines*. *Id.*

[85] 77 Fed. Cl. 180 (2007).

[86] *Id.* at 181.

Office for the Blind, a state licensing agency (SLA), and Moore's Cafeteria Services, d/b/a MCS Management (MCS), the incumbent, protested to the GAO.[87] The GAO denied the protest, and MCS filed its action in the COFC.[88]

MCS protested the Army's decision not to follow guidance in a joint report to Congress that defined a fair and reasonable price offered by an SLA as one that does not exceed the offer representing the best value by more than 5%.[89] In the initial solicitation, the Army stated that the procurement was *subject to* the Joint Report 5% requirement.[90] The contracting agency's regional counsel then informed the agency that the Joint Report was not effective until implemented by regulations, and that solicitations should not reference the Joint Report.[91] The Army amended the solicitation by removing reference to the Joint Report.[92]

The COFC determined that MCS had the opportunity to protest the removal of the Joint Report language and policy after the solicitation amendment and before offers were due.[93] MCS failed to protest and thus, under the rule dictated by the CAFC in *Blue & Gold*, MCS waived its right to protest the solicitation issue in a protest before the COFC.[94]

When Is an E-mail to the GAO Received?

The GAO took two unusual steps in a case in December 2006. In *Guldmann, Inc.* (*Guldman IV*),[95] the GAO reconsidered an earlier decision and changed its stance.[96] With this reconsideration, the GAO also allowed a request for reconsideration (Request) regarding an earlier protest despite the fact that the request was received in the GAO e-mail mailbox after the 5:30 p.m. deadline at 5:31 p.m.[97]

The GAO issued its decision in *Guldmann, Inc.* (*Guldmann II*)[98] on 3 November 2006.[99] On 13 November 2006, Guldmann, Inc. (*Guldmann I*) filed its Request.[100] Guldmann filed the Request via e-mail, and the e-mail arrived in the GAO e-mail mailbox at 5:31 p.m.[101] Under the GAO filing rules, documents must be received by the GAO by 5:30 p.m. on the last day of the filing period; any documents received after 5:30 p.m. are deemed filed the following day.[102] Because the Request was received on the eleventh day, it was late and the GAO dismissed the Request as untimely filed.[103]

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[87] *Id*.

[88] *Id*. at 183, 184.

[89] *Id*. at 183.

[90] *Id*. at 182. The solicitation stated:

> [A] technically acceptable offer from a qualified State Licensing Agency will receive preference in accordance with the Joint Report to Congress, dated August 29, 2006. This notice is not designed to discourage competition from HUB Zone certified small businesses not eligible for the preference. . . . Application of this preference may result in award to other than the lowest priced technically acceptable offeror.

Id. (citing the Administrative Record, pp. 44–45).

[91] *Id.* The COFC quoted an email from Lieutenant Colonel Karl Kuhn, Regional Counsel to the U.S. Army Contracting Agency in which he forwarded and email discussing Department of Defense policy that the Joint Report was not to be cited until implemented by regulation. *Id*. Lieutenant Colonel Kuhn's email also advised that contracting officers could use the five percent standard from the Joint Report voluntarily so long as the use was based on the contracting officer's independent business judgment. *Id*.

[92] *Id*.

[93] *Id*. at 185.

[94] *Id*.

[95] Guldmann, Inc. (*Guldmann IV*), Comp. Gen. B-298585.4, Dec. 13, 2006 (unpublished decision) (on file with author).

[96] *Id*.

[97] *Id*.

[98] Guldmann, Inc. (*Guldmann II*), Comp. Gen. B-298585.2, Nov. 3, 2006 (unpublished decision) (on file with author).

[99] Guldmann, Inc. (*Guldmann I*), Comp. Gen. B-298585.4, Dec. 13, 2006 (unpublished decision) (on file with author).

[100] *Id*.

[101] *Id*.

[102] 4 C.F.R. § 21.0 (2007).

[103] *Guldmann I*., Comp. Gen. B-298585.4.

On 8 December 2006, Guldmann requested that the GAO reconsider its decision dismissing the Request, and specifically asked the GAO to review its e-mail records.[104] Upon review, the GAO discovered that it actually received the Request at the GAO server at 5:28:22 p.m., and the Request passed through the firewall at 5:30:29 p.m.[105] With this evidence, the GAO reversed its dismissal of the Request as untimely filed, and re-opened the original Request.[106] Thus, a document sent to the GAO via e-mail now appears to be filed as of the time the document arrives at the GAO server.[107]

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

GAO Bid Protest Statistics for Fiscal Years 2003–2007[108]

	FY 2007	FY 2006	FY 2005	FY 2004	FY 2003
Cases Filed	1,411 (up 6%[1])	1,327 (down 2%)	1.356 (down 9%)	1,485 (up 10%)	1,352 (up 12%)
Cases Closed	1,393	1,274	1,341	1,405	1,244
Merit (Sustain + Deny) Decisions	335	249	306	365	290
Number of Sustains	91	72	71	75	50
Sustain Rate	27%	29%	23%	21%	17%
Effectiveness Rate (reported)[2]	38%	39%	37%	34%	33%
ADR[3] (cases used)	62	91	103	123	120
ADR Success Rate[4]	85%	96%	91%	91%	92%
Hearings[5]	8% (41 cases)	11% (5 cases)	8% (41 cases)	9% (56 cases)	13% (74 cases)

[1] From the prior fiscal year.
[2] Based on a protester's obtaining some form of relief from the agency, as reported to GAO.
[3] Alternative Dispute Resolution.
[4] Percentage resolved without a formal GAO decision.
[5] Percentage of fully developed decisions in which GAO conducted a hearing.

Major Mark A. Ries

[108] Letter from Gary L. Kepplinger, General Counsel, U.S. Government Accountability Office, to The Honorable Nancy Pelosi, Speaker of the House of Representatives, subject: B-158766 (10 Dec. 2007), *available at* http://www.gao.gov/special.pubs/bidpro07.pdf.