The Professor's Forum

IDIQ Contracting

Virtual Class February 16, 2023 12:00pm – 1:30 pm (ET)

One of the major changes that has come about as a result of the acquisition reform effort in the 1990s is the widespread use of indefinite delivery/indefinite quantity (IDIQ) contracts. In 1994 the Federal Acquisition Streamlining Act, Pub. L. No. 103-355, adopted statutory provisions on "task and delivery order" contracts which the FAR applies to IDIQ contracts. These provisions have been amended several times and are now codified in 10 U.S.C. § 3401-06 and 41 U.S.C. § 4101-06 and implemented in FAR 16.504-05.

The extent of use of these contracts is reported by the Government Accountability Office. *See Agencies Widely Used Indefinite Contracts to Provide Flexibility to Meet Mission Needs*, April 2017, GAO-17-329, indicating that approximately one-third of government contract obligations from fiscal years 2011 through 2015 were placed on IDIQ contracts. Additionally, GAO reported that approximately 60% of these amounts were for single-award (not multiple-award) contracts and approximately 70% of these amounts were for services with the balance for products. *See also Defense Contracting: Use by the Department of Defense of Indefinite-Delivery Contracts from Fiscal Years 2015 through 2017*, May 10, 2018, GAO-18-412R, reporting that approximately 40% of DOD obligations from fiscal years 2015 through 2017 were placed on IDIQ contracts. Of these amounts, approximately 75% were for single-award contracts. These GAO reports also indicate that the amount of IDIQ contracting increased each year of the study.

Government-wide acquisition contracts (GWACs) and multiagency contracts (MACs) are also awarded as IDIQ contracts. These contracts, open to all agencies, all have multiple awardees, permitting intense competition for task and delivery orders.

IDIQ contracts can be awarded for any type of work because “delivery orders” relate to contracts for supplies and “task orders” relate to contracts for services. *See Tyler Constr. Group v. United States*, 570 F.3d 1329 (Fed. Cir. 2009), holding that construction work could be treated as a service under an IDIQ contract because there was no statute or regulation prohibiting this practice—citing FAR 1.102(d).

A major advantage of IDIQ contracts is that one or more contractors are immediately available to provide quotations for a task or delivery order for needed services or products. If agencies limit the scope of these quotations, they can then award the order in a short period of time.

I. Definitions

10 U.S.C. §3401 and 41 U.S.C. § 4101, defining IDIQ contracts as task order and delivery order contracts, contain the following definitions:

> (1) *Delivery order contract*. The term "delivery order contract" means a contract for property that--
>
> > (A) does not procure or specify a firm quantity of property (other than a minimum or maximum quantity); and
> >
> > (B) provides for the issuance of orders for the delivery of property during the period of the contract.
>
> (2) *Task order contract*. The term "task order contract" means a contract for services that--
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> > (A) does not procure or specify a firm quantity of services (other than a minimum or maximum quantity); and
> >
> > (B) provides for the issuance of orders for the performance of tasks during the period of the contract.

The terms “delivery order” and “task order” are not defined, with the result that such orders can be very broad in scope and duration. This is particularly true of task orders for services which have been issued for broadly defined services over many years. However, GAO has ruled that an agency may not issue a single order that calls for the subsequent issuance of orders as the work is defined, *Harris IT Servs. Corp*., B-411699, 2015 CPD ¶ 293 (calling the prohibited order a "single, second-tier IDIQ instrument"). *See also DLT Solutions, Inc*., B-412237, 2016 CPD ¶ 19, confirming GAO's view that such task orders are improper. *Compare Sek Solutions, LLC v. United States*, 117 Fed. Cl. 43 (2014), finding a similar contract proper.

II. Issuing the Original IDIQ Contract(s)

The base IDIQ contract has always been awarded following the competitive negotiation procedures in FAR Part 15. However, there are a number of issues in this award process that are distinct from the general rules governing competitively awarded contracts for a defined scope of work *(i.e.,* for definite quantities).

A. Multiple-Award Preference

10 U.S.C. § 3403(d)(4) and 41 U.S.C. § 4103(d) contain a multiple-award preference for task order and delivery order contracts—intended to make it difficult to award an IDIQ contract to a single source. When an agency is obtaining a significant amount of supplies or services over long periods of time through the use of IDIQ contracts, there are substantial benefits to be obtained through the issuance of more than one contract. The major benefits of the continuous competition that can be achieved under multiple contracts are the ability to control the prices of individual task and delivery orders and the ability to award such orders based on the past performance of the contractors. Multiple contracts also permit the agency to award IDIQ contracts to contractors with varying skills—giving the government access to a broader range of competence than would be possible with only a single contract.

However, these statutes allow considerable discretion in determining that a single award will better meet the agency's needs. FAR 16.504(c)(1)(ii) implements these statutes as follows:

> (A) . . . The contracting officer should consider the following when determining the number of contracts to be awarded:
>
> (1) The scope and complexity of the contract requirement.
>
> (2) The expected duration and frequency of task or delivery orders.
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> (3) The mix of resources a contractor must have to perform expected task or delivery order requirements.
>
> (4) The ability to maintain competition among the awardees throughout the contracts' period of performance.
>
> (B) The contracting officer must not use the multiple award approach if -
>
> (1) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;
>
> (2) Based on the contracting officer's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;
>
> (3) The expected cost of administration of multiple contracts may outweighs the expected benefits of making multiple awards;
>
> (4) The projected orders are so integrally related that only a single contractor can reasonably perform the work;
>
> (5) The total estimated value of the contract is less than the simplified acquisition threshold; or
>
> (6) Multiple awards would not be in the best interests of the Government.

The decision to make a single award must be documented by the contracting officer. If the total contract amount can exceed $100 million, the head of the agency must write a determination and finding justifying the single source and the action must be reported to Congress within 30 days. FAR 16.504(c)(1)(C) & (D). The intention to make a single award should be clearly stated in the RFP and the Single or Multiple Awards solicitation provision in FAR 52.216-27 should not be included in the RFP. *See American Sys. Corp.*, B-415361, 2018 U.S. Comp. Gen. LEXIS 320, where the RFP included statements of the intention to make a single award plus the FAR 52.216-27 solicitation provision. GAO denied the protest asserting that this required multiple awards, holding that the single-award language was clear and that, if these provisions created an ambiguity, that had to be protested before proposal submission.

A few single-award determinations have been held not to be properly based on the factors set forth in the FAR. *See CW Gov't Travel, Inc. v. United States*, 110 Fed. Cl. 462 (2013) (fact that protester's proposal was "marginal" with correctable issues did not justify denying it award and selecting only one awardee); *Information Ventures, Inc*., B-403321, 2010 CPD ¶ 223 (fact that when multiple contracts were issued, some contractors did not provide acceptable products not a justification for single award); *One Source Mech. Servs., Inc*., B-293692, 2004 CPD ¶ 112 (administrative cost and time required to conduct competitions between multiple awardees not a justification for single award). In *IBM U.S. Federal*, B-407073.3, 2013 CPD ¶ 142, GAO

recommended corrective action because a single-award contract had been improperly competed. The Court of Federal Claims held that the GAO decision was irrational and effectively reinstated the original award. *Amazon Web Servs., Inc. v. United States*, 113 Fed. Cl. 102 (2013).

On the other hand, single awards have been affirmed in a number of cases. *See Oracle America., Inc.*, B-416657, 2018 CPD ¶ 391, and *Oracle America, Inc. v. United States*, 144 Fed. Cl. 88 (2019), *aff'd*, 975 F.3d 1279 (Fed. Cir. 2020) (single contract justified because of complexity of integrating cloud requirements); *Delta Risk, LLC*, B-416420, 2018 CPD ¶ 305 (single contract justified because of only one compliant proposal); *CWTSatoTravel*, B-404479.3, 2012 CPD ¶ 281 (single award justified when protester could not be ready to perform upon award); *KSD, Inc. v. United States*, 72 Fed. Cl. 236 (2006) (single award for proprietary products justified); *SmithKline Beecham Pharms.*, B-277253.4, 97-2 CPD ¶ 78 (single award justified by belief of contracting officer that more favorable terms will be achieved by a single requirements contract); *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 345 (1997) (single award justified because advisory and assistance services being procured are so integrally related that they could not be performed by more than one contractor). In *Palantir USG, Inc.*, B-412746, 2016 CPD ¶ 138, GAO agreed that a single IDIQ contract was justified because the agency needed to design a new system. The Court of Federal Claims rejected the single-award approach because of the availability of commercial software that met most of the requirements. *Palantir Techs. Inc. v. United States*, 128 Fed. Cl. 21(2016), *aff'd*, 904 F.3d 960 (Fed. Cir. 2018).

B. Evaluation and Award

The FAR gives very little guidance on the evaluation and award of IDIQ contracts; however, the FAR Part 15 negotiation and tradeoff technique has been used in most cases. This entails the evaluation of cost or price and an array of potential evaluation factors—usually including past performance, experience, and understanding of the work (demonstrated by technical and management proposals).

The evaluation of prices presents special challenges because the nature of the IDIQ contract is that there is no total price at the outset yet the statutes make price a mandatory evaluation factor. Thus, agencies have used different techniques to approximate prices for evaluation purposes, usually involving the evaluation of unit prices or fixed labor rates multiplied by estimated quantities contained in the RFP, or the proposed prices of sample tasks. GAO has ruled that the mere evaluation of unit prices or fixed labor rates without multiplying these rates by estimated quantities to arrive at an estimated "price" is improper, *KISS Eng'g Corp.*, B-221356, 86-1 CPD ¶ 425 (rejecting the use of an average labor rate, including indirect costs, profit, and material, because there was "no necessary relationship between this rate and the likely actual cost of the contract"); *SCIENTECH, Inc.*, B-277805.2, 98-1 CPD ¶ 33 (rejecting comparison of fixed labor rates and fee ceilings); *S.J. Thomas Co.*, B-283192, 99-2 CPD ¶ 73 (rejecting the comparison of "mark-up rates" (excluding labor rates and material) for construction work); *AirTrak Travel*, B-292101, 2003 CPD ¶ 117 (rejecting the averaging of travel service area "transaction fees" when usage will vary between areas); *R&G Food Serv., Inc.*, B-296435.4, 2005 CPD ¶ 194 (rejecting comparison of unit prices for meals, mileage and hand washing because they were not multiplied by estimated quantities); *6K Sys., Inc.*, B-408124.3, 2014 CPD ¶ 347 (rejecting selection of unit labor rates to compare prices); and

Veterans Evaluation Servs., Inc., B-412940, 2016 CPD ¶ 185 (rejecting addition of unit prices for medical procedures to arrive at "prices"). The Court of Federal Claims disagreed with this reasoning in *Linc Gov't Servs., LLC v. United States*, 95 Fed. Cl. 155 (2010), where the court denied a protest that the agency had compared unit prices without multiplying them by estimated quantities. In that procurement the agency had provided estimated quantities in the RFP and had used them to check the proposed unit prices to ensure that they were not unbalanced. *See also Bristol-Myers Squibb Co.*, B-294944.2, 2005 CPD ¶ 16, and *SmithKline Beecham Corp.*, B-283939, 2000 CPD ¶ 19, where comparing unit prices of drug dosages was proper because the expected dosage per day was the major use of the drug and the agency had no way to estimate other uses.

In procurements using the tradeoff technique, this leaves agencies with two possible ways to evaluate price—using estimated quantities stated in the RFP multiplied by proposed unit prices or fixed labor rates to arrive at a total "price," or obtaining prices for sample tasks. GAO has endorsed the use of estimated quantities, *LexisNexis*, B-402114, 2010 CPD ¶ 17; and *Bering Straits Tech./Servs., LLC*, B-401560.3, 2009 CPD ¶ 201. It has also endorsed the use of sample tasks when offerors are required to propose "binding" fixed unit prices or labor rates and to use such prices or rates in arriving at their price for the sample task(s) that are proposed, *CW Gov't Travel, Inc.*, B-295530.2, 2005 CPD ¶ 139. However, the sample tasks must be representative of the type of work that is expected to be performed on the contract, *MAR*, B-414810.5, 2018 CPD ¶ 266 (sample task covered almost half of the work); *U.S. Electrodynamics, Inc*., B-414678, 2017 CPD ¶ 252 (two sample tasks were for designated work even though offerors were to propose innovative methods); *Dayton T. Brown, Inc*., B-402256, 2010 CPD ¶ 72 (sample task encompassed many of the anticipated labor categories); *Information Ventures, Inc*., B-299255, 2007 CPD ¶ 80 ("Although the sample task here is not reflective of the full range of services that the agency may order under the contracts to be awarded, we are not persuaded that it is not sufficiently typical of the work to be performed"); *Metro Mach. Corp*., B-297879.2, 2006 CPD ¶ 80 (cost realism analysis flawed because "notational" tasks were not sufficiently representative of work). Furthermore, when an agency has no reasonable method to prepare a representative sample task, a hypothetical sample task has been approved when the protester could not show that its use led to an unreasonable evaluation of the actual costs of performance, *High Point Schaer*, 524 (B-242616), 91-1 CPD ¶ 509; *Aalco Forwarding, Inc*., B-277241.15, 98-1 CPD ¶ 87. The use of sample tasks will be rejected if the agency does not ensure that the labor rates used to price the sample tasks are realistic, *I.M. Sys. Group*, B-404583, 2011 CPD ¶ 64. If a sample task is ambiguous, it must be protested before the submission of proposals, *Mevacon/NASCO JV*, B-414329, 2017 CPD ¶ 144.

Some agencies have used a combination of unit labor rates and sample tasks. *See General Dynamics Information Tech., Inc*., B-415568, 2018 CPD ¶ 63 (a sample task, the first actual task and proposed fixed labor rates multiplied by undisclosed estimated labor hours); *Computer Sciences Corp.*, B-408694.7, 2014 CPD ¶ 331 (a fixed-price sample task, a cost-reimbursement sample task and evaluation of fixed labor rates); and *Intelligent Decisions, Inc*., B-409686, 2014 CPD ¶ 213 (two sample tasks and proposed maximum labor rates times estimated quantities).

The General Services Administration has used an innovative technique to select the pool of contractors for its IDIQ GWACs called the "highest technically rated with fair and reasonable

price" technique. Under this technique the government does not compare prices in a tradeoff selection but merely evaluates whether the highest technically rated offerors have proposed fair and reasonable prices. Its use on the OASIS GWAC was approved in *Octo Consulting Group, Inc. v. United States*, 117 Fed. Cl. 334 (2014). Its use on the ALLIANT 2 GWAC was approved in *Sevatec, Inc.*, B-413559.3, 2017 CPD ¶ 17; *Dynanet Corp. v. United* States, 139 Fed. Cl. 579 (2018); *Technical & Mgmt. Resources, Inc., LLC v. United States*, 139 Fed. Cl. 589 (2018); *Criterion Sys., Inc. v. United States*, 140 Fed. Cl. 29 (2018); and *RX Joint Venture, LLC v. United States*, 140 Fed. Cl. 13 (2018). In *Citizant, Inc. v. United States*, 142 Fed. Cl. 260 (2019), the court granted a protest on the ALLIANT 2 Small Business GWAC because the contracting officer had made errors in adjusting the score of Citizant and had been inconsistent in determining whether the offerors had fair and reasonable prices. This decision led to the agency withdrawing all of the prior awards that had been made. This technique cannot be used if the RFP states that the winners will be selected by making a tradeoff between prices and the other evaluation factors, *Millennium Corp*, B-416485.2, 2018 CPD ¶ 329.

This technique has two unique features. First, it confines the "technical proposals" to experience, past performance, certifications/clearances and organizational risk assessment. Thus, it omits any requirement for a written proposal stating how an offeror proposes to perform or manage the prospective work. Second, it contains detailed guidance on the scoring of each evaluation factor, with each offeror to self-score itself and document the score - subject to verification by the agency. *See Amaze Techs., LLC*, B-419141, 2021 CPD ¶ 9 (deduction of points reasonable). Third, it evaluates price by assessing the reasonableness of each offeror's cost elements and profit without any comparison among offerors. Thus, an offeror's price is to be assessed as fair and reasonable if its cost and profit rates comport with the rates that it charges to other customers. In effect, this provides the agency with a pool of contractors with the most experience and qualifications to perform the information technology work called for by the GWAC.

DOD, NASA and the Coast Guard have also been authorized to compete IDIQ contracts without evaluating price if award is made to all responsible sources that submit conforming proposals. *See* § 825 of the National Defense Authorization Act for FY 2017, Pub. L. No. 114-328, adding 10 USC § 2305(a)(3). This provision is implemented in FAR 15.304(c)(1)(ii) giving contracting officers in those agencies the discretion to use the technique in all multiple-award IDIQ procurements above the simplified acquisition threshold. It applies to all IDIQ contracts and defers the consideration of price to the task or delivery orders issued under these contracts. The requirement that contracts be awarded to all “qualifying offerors” makes the statute significantly different from the GSA technique because GSA designates a specific number of awardees, no matter how many proposals are submitted, while the statute requires award of a potentially far greater number of contracts. This statute is also very different from the GSA technique because it leaves the determination of the non-price evaluation factors up to each agency that uses the technique. Thus, while GSA focuses on experience and past performance, an agency using this statute could call for technical and management proposals and exclude offerors that did not fully comply with the requirements for these proposals. *See SigNet Techs., Inc*., B-418677, 2020 CPD ¶ 244, where the agency used a technical evaluation factor based on the proposed solution to a sample problem to determine whether the offeror had sufficient knowledge to be qualified to perform the contract. Based on the evaluation of the initial offers

without conducting either clarifications or discussions, the agency awarded 17 contracts out of the 31 offerors. GAO denied the protest that the agency should have requested clarifications to the sample task solutions.

C. Structuring the Contract

10 U.S.C. §3403(b) and 41 U.S.C. § 4103(b) require that solicitations for IDIQ contracts contain –

> 1. the period of the contract, including the number of options to extend the contract and the period for which the contract may be extended under each option;
> 2. the maximum quantity or dollar value of the services or property to be procured under the contract; and
> 3. a statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract.

These contracts must also contain a minimum quantity that is not nominal in order to be enforceable contracts.

1. Contract period. Paragraph (f) of 10 U.S.C. §3403 allows a base period of five years and options for five additional years, with a period of no longer than 10 years without the approval of the head of the agency. There is no similar provision in 41 U.S.C. § 4101 *et seq*. FAR 16.504(a)(4)(i) merely states that IDIQ contracts must specify the period of performance including options. FAR 17.204(e) also contains a general five-year limitation on all contracts. 41 U.S.C. § 3304(c)(1)(B) contain a one-year limitation on contracts over the simplified acquisition threshold that are awarded without full and open competition based on urgency, unless the head of the agency determines that exceptional circumstances apply. There is no similar provision in 10 U.S.C. § 3401 et seq. 10 U.S.C. § 3405(c) and 41 U.S.C. § 4105(c) limit task or delivery order contracts for advisory and assistance services to five years, unless a specific statute permits a longer period.

Some agencies have interpreted this guidance as calling for IDIQ contracts to have a base period of one or two years with one or more option years. However, the same result can be achieved by writing the contract for a five-year period, with or without option years. This would minimize the need to follow the regulatory rules on the exercise of options. In either case, orders cannot be issued until appropriations are available and the order is for a bona fide need of the agency in the year ordered.

2. Maximum quantity. FAR 16.504(a)(1) provides that the contract should contain a maximum quantity that should be "reasonable" and "based on market research, trends on recent contracts for similar supplies or services, survey of potential users, or any other rational basis." It also permits maximum quantities for any single task or delivery order and maximum quantities that may be ordered during any specified period of time. While care should be used in ensuring that maximum quantities are not overstated, there is no government liability for such overstatement, *C.F.S. Air Cargo, Inc*., ASBCA 40694, 91-2 BCA ¶ 23,985, *aff'd*, 972

F.2d 1353 (Fed. Cir. 1992). See also *Supreme Foodservice GmbH*, B-405400.1, 2011 CPD ¶ 244, denying a protest that the maximum quantity was overstated when the President had ordered a troop withdrawal but the agency did not have firm information as to the impact of the withdrawal.

3. Statement of work. The statement of work can describe a broad scope of work, but it should be sufficiently precise to allow competing offerors to understand the range of task or delivery orders that the agency intends to order under the contract. There is a general preference for performance-oriented statements of work instead of precise specifications and statements of work that encourage furnishing commercial products and services. FAR 11.002(a)(2).

4. Minimum quantity. The minimum quantity must be more than a nominal quantity to ensure that the contract is legally binding. The only other guidance contained in FAR 16.504(a)(2) is that the minimum quantity should not exceed the amount "that the Government is fairly certain to order." All other information on minimum quantities must be included in the contract schedule. A minimum order limitation is to be included in ¶ (a) of the mandatory Order Limitations clause in FAR 52.216-19, but this does not serves as a minimum quantity but rather as a protection against very small orders.

There appears to be a tendency for contracting officers to specify very low contract minimums in order to limit the government's liability in the event its requirements change during the life of the contract and to avoid obligating significant amounts of funds at the inception of the contract. However, better prices may be obtained if higher minimum quantities are specified. When multiple contracts are awarded and orders will be placed competitively, the ordering process should control the prices, and there will be little need for concern about the impact of low minimum quantities.

5. Mandatory participation. Although there is no guidance on this issue, some agencies have used a provision requiring holders of multiple-award IDIQ contracts to compete for each task or delivery order issued by the agency. *See*, *e.g.*, *OMNIPLEX World Servs. Corp*., B-295698, 2005 CPD ¶ 43, denying a protest that a provision requiring participation and allowing the agency to issue task orders to contract holders that do not submit a quotation using agency estimates based on ceiling labor rates.

6. Provisions Allowing Changing the Pool of Contractors. When an agency intends to award multiple IDIQ contracts that extend over a number of years, it is not uncommon for one or more of the contract holders to be unsuccessful in competing for task or delivery orders. It is therefore good practice to provide in such contracts that either party can terminate their participation by giving notice to the other party. Such provisions can also provide that the government can add a contractor to the pool of contractors. For an example of a provision allowing the addition of contractor to the original pool of awardees, *See National Air Cargo Group, Inc. v. United States*, 126 Fed. Cl. 281 (2016).

III. Issuing Task and/or Delivery Orders

The ordering of work under IDIQ contracts is subject to different rules than those applicable to the award of contracts. The general procedures for ordering are contained in the mandatory Ordering clause in FAR 52.216-18. Some agencies use ordering clauses that contain more detailed guidance on the ordering process. *See, e.g.*, the Ordering clause in DFARS 252.216-7006, the Task Ordering Procedures clause in NFS 1816.515-80, and the Placement of Orders clause in GSAR 552.216-72.

Solicitations for task and delivery orders are generally prepared in the form of Requests for Quotations, Task Order Requests for Proposals, or Requests for Proposals. FAR 16.505(a) contains detailed rules regarding these solicitations.

A. Protests

Protests asserting that a task or delivery order was *outside of the scope* of the contract have always been accepted by the GAO and the Court of Federal Claims. *See, e.g.*, *Alliant Solutions, LLC*, B-415994, 2018 CPD ¶ 173 (task order for migrating to and operating a cloud facility outside the scope of IDIQ contract for research and analysis involving cloud systems); *Western Pilot Service*, B-415732, 2018 CPD ¶ 104 (task order for flight services materially different from on-call services called for by IDIQ contract); *BayFirst Solutions, LLC v. United States*, 104 Fed. Cl. 493 (2012) (task order for different work within scope because broad language in IDIQ contract stated that task order holders could be required to provide different types of employees to different offices of the agency). These scope decision deal with the description of the work covered by the contract, not the procedures used to issue task orders. *MayaTech Corp*., B-419313, 2020 CPD ¶ 366.

The original task and delivery order statutes as enacted in FASA precluded any protests of task or delivery orders other than on grounds of scope. However, 10 U.S.C. §3406(g) and (f) and 41 U.S.C. § 4106(f) now require agencies to have a task and delivery order ombudsman and allow protests to GAO for large orders—orders in excess of $25 million for DOD, NASA and the Coast Guard and in excess of $10 million for other agencies. GAO receives in excess of 400 protests per year under this authority. The Court of Federal Claims is not empowered to hear such protests. Some agencies take the position that GAO's exclusive jurisdiction over such protests also extends to agency protests.

GAO applies these thresholds to the order that is being protested. *Goldbelt Glacier Health Servs., LLC*, B-410378, 2014 CPD ¶ 281 (actual dollar amount of order issued is appropriate measure of task order value). In *EA Eng'g, Sci., & Tech., Inc.*, B-411967.2, 2016 CPD ¶ 106, GAO took jurisdiction of a protest asserting that its task order had been terminated because it was over the threshold, even though the subsequently awarded task order was under the threshold. GAO reasoned that the protester could not challenge the new task order but could challenge the termination. However, in *AMAR Health IT, LLC*, B-414384.3, 2018 CPD ¶ 111, GAO refused to follow this ruling because the original task order had "lapsed" rather than being terminated.

As is the case with protests for base contracts, protests of solicitation defects in task or delivery orders must be submitted prior to the closing date for the receipt of quotations. *Antico*

Cantiere Del Legno Giovanni Aprea Di Cataldo S.R.L., B-414112, 2017 CPD ¶ 58.

B. Within-The-Scope Requirement

A task or delivery order may not "increase the scope, period or maximum value" of the contract. Such increases may only be accomplished "by modification of the contract," 10 U.S.C. § 3403(e) and 41 U.S.C. § 4103(e). Although not specifically stated in these sections, procurement notices and competition would be required for such actions unless a noncompetitive award could be justified, since the exemption from competition is only applicable to task or delivery orders within the scope of the contract. In contrast, contract modifications of task orders for advisory and assistance services are explicitly stated to be subject to competition requirements. 10 U.S.C. § 3405(g)(2) and 41 U.S.C. § 4105(g)(2). Under limited circumstances, a one-time extension not exceeding six months may be made on a "sole-source basis," 10 U.S.C. § 3406(h) and 41 U.S.C. § 4105(h).

The background and circumstances surrounding the award of a contract may indicate that an order under an otherwise broad work statement is not within the scope of the contract. *See Alliant Solutions, LLC*, B-415994, 2018 CPD ¶ 173 (task order for migrating to and operating a cloud facility outside the scope of IDIQ contract for research and analysis involving cloud systems); *Western Pilot Service*, B-415732, 2018 CPD ¶ 104 (task order for flight services materially different from on-call services called for by IDIQ contract); *DynCorp Int'l LLC*, B-402349, 2010 CPD ¶ 59 (task orders for the mentoring and training of Afghani troops outside the scope of IDIQ contracts for the DoD Counter Narcoterrorism Technology Program Office); and *Anteon Corp*., B-293523, 2004 CPD ¶ 51 (task order request for cloth cover sheets for electronic passport covers outside the scope of a contract for credit card-sized plastic cards). In *Comdisco, Inc*., B-277340, 97-2 CPD ¶ 105, GAO sustained a protest where an agency exceeded the scope of its task orders for computer equipment and related services by permitting computer hardware/software to constitute more than its allotted share of a contract.

Task orders were found to be within the scope of the contract in *C3.ai, Inc*., B-418676, 2020 CPD ¶ 256 (rejecting argument that calling for the use of new technologies was outside scope because contract was written with broad language to allow just such work); *Global Dynamics, LLC*, B-417776, 2019 CPD ¶ 366 (rejecting argument that agency improperly limited competition to contractors having two IDIQ contracts for different types of personnel); *People, Tech. & Processes, LLC*, B-417273, 2019 CPD ¶ 173 (rejecting argument that examples in statement of work limited types of training because the statement also contained a general description of covered work); *American Sys. Group*, B-415381, 2018 CPD ¶ 86 (rejecting argument that position descriptions in task order differed from base IDIQ contract because the contract had a "wide range" of professional services); and *Lockheed Martin Fairchild Sys*., B-275034, 97-1 CPD ¶ 28 (modernization of computer-based training within scope of contract for automatic data processing systems integration and support services). In *Draeger, Inc*., B-414938, 2017 CPD ¶ 308, a scope protest was denied as untimely because the protester had inquired as to the scope of the contract when it was originally competed and had not protested the agency's broad interpretation at that time.

C. "Fair Opportunity" Requirement

When issuing orders under multiple-award IDIQ contracts, holders of such contracts must be given a "fair opportunity" to compete for awards over $3,500, FAR 16.505(b)(1)(i). In general, this should entail notice to each contractor and sufficient time to prepare a quotation. Such notice is mandatory for orders over the simplified acquisition threshold, FAR 16.505(b)(1)(iii). FAR 16.505(b)(1)(iv) contains explicit guidance on the contents of the notice for orders over $6 million.

FAR 16.505(b)(2) lists the following exceptions to the requirement for a fair opportunity:

1. Urgency.
2. Unique or highly specialized work available from only one source.
3. A logical follow-on to a previous order if all awardees were given a fair opportunity to be considered for the original order.
4. An order to satisfy a minimum guarantee.
5. An order that a statute expressly authorizes or requires be made from a specified source.
6. A small business set-aside.

On almost all of the protests asserting that an agency has not afforded a contractor a fair opportunity, GAO has ruled in favor of the agency. *See Marine Hydraulics Int'l, LLC*, B-420562, 2022 CPD ¶ 122 (small business set-aside proper); *Boswell & Dunlop, LLP*, B-416623, 2018 CPD ¶ 351 (fair opportunity rule satisfied by posting solicitation on fedbizops); *Technica Corp*., B-416542, 2018 CPD ¶ 348 (issuance of sole-source task order based on urgency reasonable because agency had expended planning time attempting to resolve problems with protester that had an option for the work); *NTD DATA Servs., Fed. Gov't, Inc*., B-416123, 2018 CPD ¶ 215 (protester participated in procurement until it was excluded from competitive range); *PricewaterhouseCoopers Public Sector, LLP*, B-415504, 2018 CPD ¶ 35 (fair opportunity rule does not require agency to adopt a strict late quotation rule); *Ocean Solutions, Inc*., B-415422, 2018 CPD ¶ 22 (protester opted out in phase one of procurement and was not prejudiced by a subsequent amendment making an immaterial change to the RFQ); *Aegis Defense Servs., LLC*, B-412755, 2016 CPD ¶ 98 (fair opportunity rule does not permit contractor to challenge task order on the ground that it will preclude a fair opportunity to compete for future task orders); and *Doug Boyd Enters., LLC*, B-298237.2, 2007 CPD ¶ 147 (fair opportunity rule does not guarantee that holder of IDIQ contract will be given enough business to remain a viable business entity). *See, however, Inquiries, Inc*., B-417415.2, 2020 CPD ¶ 54, sustaining a protest where the agency added work to a task order on a sole-source basis citing an exception to the fair opportunity rule but the GAO found that the added work created an organizational conflict of interest. GAO has also stated that the advanced planning requirement does not apply to orders issued under IDIQ contracts, *Technica Corp*., B-416542, 2018 CPD ¶ 348.

Appeals of the lack of a fair opportunity have been heard by the Court of Federal Claims on the ground that these are Contract Disputes Act claims that the agency breached the basic IDIQ contract, *Vanquish Worldwide, LLC v. United States*, 147 Fed. Cl. 390 (2020); *Digital Techs., Inc. v. United States*, 89 Fed. Cl. 711 (2009). *Compare Orbis Sibro, Inc. v. United States*, 117 Fed. Cl. 446 (2014), where the court concluded that it did not have Contract Disputes Act

jurisdiction over a claim of lack of fair opportunity because the claim solely concerned issues dealing with the evaluation of a task order.

There is a split between the GAO and the Court of Federal Claims as to whether the fair opportunity rule permits a contractor holding an IDIQ contract to protest the award of another IDIQ contract. *See National Air Cargo Group, Inc*., B-411830.2, 2016 CPD ¶ 85; and *Aegis Defense Services, LLC*, B-413755, 2016 CPD ¶ 98 (holding it does not), and *National Air Cargo Group, Inc. v. United States*, 127 Fed. Cl. 707 (2016) (holding it does).

Appeals alleging the lack of a fair opportunity have been heard by the boards of contract appeals as contract disputes regarding compliance with the IDIQ contract, not protests concerning the issuance of task or delivery orders. *See Smart Way Transportation Servs.*, ASBCA 60315, 16-1 BCA ¶ 36,569 (no breach of the fair opportunity rule because the agency had conducted no competitive procurements of task orders when the contract was in effect); *SIA Constr., Inc*., ASBCA 57693, 14-1 BCA ¶ 35,762 (alleged improper government conduct in competing delivery orders); *PAW & Assocs., LLC,* ASBCA 58534, 13-1 BCA ¶ 35,462, 15-1 BCA ¶ 36,078 (alleged breach of IDIQ contract by disclosure of proprietary information in task order competition); *L-3 Communications. Corp.*, ASBCA 54920, 08-1 BCA ¶ 33,857 (breach of IDIQ contract by improper evaluation of cost/price factor in delivery order competition—damages are cost of preparing quotation); and *Community Consulting Int'l*, ASBCA 53489, 02-2 BCA ¶ 31,940 (alleged breach of statement in IDIQ contract that competition would be limited to the four awardees of contracts). *See also A-Son's Constr., Inc. v. Dep't of Housing & Urban Development*, CBCA 3491, 15-1 BCA ¶ 36,184, taking jurisdiction of a dispute concerning the interpretation of the provisions of an IDIQ contract.

D. Source Selection Procedures

Agencies have broad authority to use streamlined and effective procedures in conducting the competition among contractors holding task and delivery order contracts. The streamlined issuance of task and delivery orders is facilitated by the fact that procurement notices are not required. FAR 5.202(a)(6), 16.505(a)(1). However, a synopsis is required for items "peculiar to one manufacturer," FAR 16.505(a)(4). In that case, the contracting officer must prepare a justification demonstrating that the item is urgently needed, unique or a logical follow-on to an earlier order. Such orders over $30,000 must be posted on the agency website. These justifications are not required if the order is placed on a single-award IDIQ contract that was awarded base on full and open competition.

This broad authority to use procedures other than the formalized procedures in FAR Part 15 allows agencies to structure a solicitation to allow free communication between agency personnel and offerors throughout the competitive process as long as they ensure that they are treating all offerors fairly and evenhandedly. They can also minimize the number of evaluation factors, thereby allowing award in a few weeks after issuing the solicitation. *See* FAR 16.505(b)(1). GAO has even endorsed the use of the highest technically rated proposal with a fair and reasonable price procedure in *Sumaria Sys., Inc*., B-418796, 2020 CPD ¶ 296.

Unfortunately, many agencies have used elaborate procedures subjecting them to protests

asserting that they have not followed the rules and decisions pertaining to procurements under FAR Part 15. *See AT&T Corp.*, B-421195, 2023 CPD ¶ __ (rationale for source selection decision must be documented); *MCR Federal, LLC*, B-416654.2, 2019 CPD ¶ 335 (eight days insufficient time to submit final proposal revisions requiring extensive staffing changes); *Cyberdata Techs., Inc*., B-417084, 2019 CPD ¶ 34 (selection decision in tradeoff procurement must look behind ratings of vendors); *Tatitlek Techs., Inc*., B-416111, 2018 CPD ¶ 410 (proper application of cost realism analysis); *Enterprise Servs., LLC*, B-414230.3, 2018 CPD ¶ 323 (no requirement to discuss significant weakness in responding to amended RFQ); *Jacobs Tech., Inc*., B-416314, 2018 CPD ¶ 271 (proper to comply with meaningful discussion requirement by reopening competition after award to clear up ambiguity); *Skyline Ultd, Inc*., B-416028, 2018 CPD ¶ 192 (meaningful discussions conducted but agency not required to allow final proposal revisions); *Vector Planning & Servs., Inc*., B-415005, 2017 CPD ¶ 360 (agency can select higher-priced offeror with better value when using tradeoff technique); *FEI Sys*., B-414852.2, 2017 CPD ¶ 349 (agency not required to ask for clarifications); *SMS Data Prods. Group, Inc*., B-414548, 2017 CPD ¶ 222 (meaningful discussions conducted); *Smartronix, Inc*., B-413721.2, 2017 CPD ¶ 59 (proper application of cost-realism analysis on cost-reimbursement LPTA task order).

E. Late Quotations

The strict late-is-late rule applicable to bids or proposals does not apply to quotations submitted to an agency for a task or delivery order unless the solicitation specifically states that quotations will not be considered unless they are submitted by a specified date. *See PricewaterhouseCoopers Pub. Sector, LLP*, B-415504, 2018 CPD ¶ 35.

F. Time of Effectiveness

The Ordering clause in FAR 52.216-18 requires the government to state a specific period during which orders can be issued. In addition, ¶ (d) of the Indefinite Quantity clause in FAR 52.216-22 states that properly issued orders must be completed by the contractor within the time specified in the order. Thus, the ordering period does not govern the time of performance of orders which can extend beyond the issuance date. *DayDanyon Corp*., ASBCA 57611, 14-1 BCA ¶ 35,507, *clarified on recons*., 14-1 BCA ¶ 35,616, *aff'd*, 600 Fed. Appx. 739 (Fed. Cir. 2015) (IDIQ contract stating that orders could be issued "from date of contract award through two years" allows orders to be issued for full two years in spite of other ambiguous language).

The Ordering clause also states that orders will be effective when deposited in the mail. If this clause is not used, the legal rules for issuing orders under IDIQ contracts will likely be governed by the law of options. For example, *Dynamics Corp. of Am. v. United States*, 389 F.2d 424 (Ct. Cl. 1968), applied strict option law in deciding whether orders, placed under a fixed-price, IDIQ contract with a specified minimum and maximum, were issued within the time period specified in the contract.

G. Failure to Order Minimum Quantity

If the government terminates the IDIQ contract before the end date for ordering, it will be

excused from its promise to order a minimum quantity, leaving the contractor with only the right to collect termination costs and profit. *DayDanyon Corp*., ASBCA 57611, 14-1 BCA ¶ 35,507, *clarified on recons*., 14-1 BCA ¶ 35,616, *aff'd*, 600 Fed. Appx. 739 (Fed. Cir. 2015). However, if the government fails to terminate the contract before the end of the ordering period, its failure to order the minimum quantity will constitute a breach of contract with compensation based on appropriate damages reflecting the injury to the contractor. In *Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988), the court held that the government was not permitted to recoup its payment of the minimum dollar amount of the contract by retroactively terminating for convenience. This appeared to entitle the contractor to the entire minimum amount of the contract even though it had not incurred the costs of the unordered work on the theory that this minimum dollar amount had been promised in return for the contractor's maintenance of the capability to perform the minimum quantity. *See, e.g., Mid-Eastern Indus., Inc*., ASBCA 53016, 02-1 BCA ¶ 31,657. However, in *White v. Delta Constr. Int'l, Inc*., 285 F.3d 1040 (Fed. Cir. 2002), the court held that damages should be computed by deducting the costs that would have been incurred from the price of the minimum quantity. *See, however*, *National Housing Group, Inc. v. Dep't of Housing & Urban Development*, CBCA 340, 11-1 BCA ¶ 34,644, *recons. denied*, 12-1 BCA ¶ 35,033 (damages could be calculated using either expectancy theory (lost management fees) or reliance theory (cost incurred waiting for work); *Admiral Elevator v. Social Sec. Admin.*, CBCA 470, 07-2 BCA ¶ 33,676 (board would accept "any workable, sensible approach" which calculates damages that put the contractor in the same position it would have been in had the minimum quantity been ordered); *Greenlee Constr. Co. v. General Servs. Admin*., CBCA 415, 07-2 BCA ¶ 33,619 ("Any costs the contractor might have incurred from performing work valued at the guaranteed minimum amount must be subtracted from that amount to reach the correct figure for damages").