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A Lawyer's View of Federal Supply Schedule Contracts

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Federal Supply Schedules: The Same As Full and Open Competition?

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By now I'm sure everyone in the Department has experienced or noticed the explosive growth and looming presence of Federal Supply Schedules ("FSS") and Blanket Purchasing Agreements. In fact, they have been marketed to the extent that even contract lawyers are receiving phone calls and promotional give aways from offerors plying their wares—and you know what happens when lawyers get involved! Procurement reform has bestowed great discretion on agencies resulting in significantly increased use of schedule-type contracting because of reduced transaction time and costs. As with all discretion, unless used wisely, it may very well be regulated away. For this reason, there are some practical considerations which should be made in utilizing this procurement tool.

Most importantly, the benefit of reduced transaction costs needs to be balanced against the benefits of full and open competition—the fundamental CICA principle—to determine the actual benefits of schedule contracting. Without such an internal analysis, public scrutiny and new regulations could be just around the corner.

FSS FAR Revisions

GSA recently promulgated revisions to regulations on its Multiple Award Schedule program which are incorporated in Part 8 of the FAR. The revised FAR provides that:

> [o]rders placed pursuant to a Multiple Award Schedule (MAS) ... are considered to be issued pursuant to full and open competition. Therefore, when placing orders under Federal Supply Schedules, ordering offices need not seek further competition, synopsize the requirement, make a separate determination of fair and reasonable pricing, or consider small business set-asides ... GSA has already determined the prices under schedule contracts to be fair and reasonable. By placing an order against a schedule using the procedures in this section, the ordering office has concluded that the order represents the best value and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government's needs.[1]

The revised FAR also contains a provision allowing negotiation of a price reduction for specific orders exceeding the maximum threshold amount.[2]

These revisions significantly change the previous FSS program in that they

- eliminate the synopsis requirement
- eliminate the requirement for independent fair and reasonableness price determination
- provide that the resulting award is considered issued under full and open competition
- allow the negotiation of price reductions for specific orders which exceed maximum threshold.
- effectively eliminate any maximum ordering threshold

In the perfect procurement world it would appear that schedule contracting, following these procedures, would result in an award beyond question. Some recent cases and experiences, however, indicate that certain aspects of schedule contracting warrant attention.

Can Items Incidental to the Schedule Be Ordered?

In June of 1997 the Court of Federal Claims ("COFC") determined that contract awards for incidental items to schedule contracts violated CICA. *ATA Defense Industries, Inc v. United States*, 38 Fed.Cl. 489 (1997). This case involved a post-award bid protest of an Army procurement for target range upgrades. Initially, the Army synopsized its intent to issue a competitive solicitation but subsequently determined to procure these items from the sole FSS contractor and again published its intent in the CBD. The only other known source did not have a schedule contract and wrote the contracting officer requesting that a "competitive procurement strategy" be employed because many required incidental items were not available under the schedule contract. As part of the FSS buy, the contracting officer did prepare a sole-source justification for the incidental items and also prepared a post-award justification based upon urgent and compelling circumstances.

In a very detailed decision, the Court, citing to 10 U.S.C. § 2302(2), noted that GSA schedules are considered to be conducted under full-and-open-competition if "(i) participation in the program has been open to all responsible sources; and (ii) orders and contracts under such program result in the lowest overall cost alternative to meet the needs of the United States..."

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The Court further observed that the Army was not required to use the GSA schedule; it could be used if "best suited under the circumstances of the procurement."

The Court, in a strict interpretation of the statutory language, found that because the incidental items were not subject to "full-and-open-competition" in the initial schedule award and that no other valid exception applied, subsequent award of the incidental items to the Schedule Contractor violated CICA. The record made clear that a majority of the incidental items were not sole-source items and the post-award urgent and compelling justification did not meet the statutory exceptions.

The Court's opinion represents a significant departure from the position taken by the General Accounting Office which, at least administratively, recognized an "incidental theory" exception for FSS contracts. *See generally, Vion Corp.*, B-275063.2, 97-1 CPD ¶ 53 (agency properly ordered incidental items necessary to operate computer system), *Raymond Corp.*, B246410, 92-1 CPD ¶ 252 (agency reasonably included incidental items worth approximately 17% of total procurement value).

The GAO cases are distinguished in that the contracting officers specifically relied on the "incidental theory" to support those procurements, whereas in *ATA* it was found to be "a *post hoc* rationalization by government counsel" rather than represent a "decision made by the contracting officer". It does not appear, however, that the result would have been different even if the contracting officer relied on this theory given the Court's strict interpretation of the CICA exceptions. The absence of any additional GAO cases makes it appear that the "incidental theory" is dead for all practical purposes.

Another particular area of importance raised in *ATA*, which affects not only schedule contracts, concerns the definition of an "interested party." The statutory authority granting jurisdiction to the COFC does not define the term interested party.[3] The COFC has generally followed the definition of interested party as developed by GAO and the GSBCA. In *ATA* the protestor was found to have post-award standing because it was a prospective bidder notwithstanding the fact that it had not submitted an offer. Specifically, the Court reasoned that because the Government had denied the opportunity for the "prospective bidder" to submit a bid, it could not now rely on that determination to void standing as an interested party. This, however, does not appear to be a wholesale expansion of the term interested party to include any prospective bidder but rather those who have taken some action to compete for the Government's requirements. *See generally*, *CC Distributors, Inc. v. United States,* 38 Fed.Cl. 771 (1997). (incumbent contractor failed to respond to CBD announcements or submit bid found not to have protest standing).

Can Subcontractors Protest Too?

Without reaching a specific conclusion, the Court also noted that "[a] party reasonably could be deemed to be interested in the award of a contract even if the party is not an actual or prospective bidder. For example, a subcontractor…would have an economic interest in the contract award and would therefore be an 'interested party' even though the subcontractor is neither an actual or perspective bidder." It is hard to tell whether the Court will actually grant jurisdiction by expanding the term interested party to include those with an "economic interest" in an award as there are many parties that may have an economic interest but only the offeror itself, would have the capability to perform the contract. On the positive side, such a broad expansion would surely mean full employment for both private and Government contract lawyers!

Synopsis Requirement: An Open Issue?

Another significant FAR revision eliminates the synopsis requirement for schedule procurements. The synopsis requirements contained in FAR were established by the Small Business Act [4] and the Office of Federal Procurement Policy Act.[5] Pursuant to those Acts requirements exceeding $25,000 must be synopsized unless one of the enumerated exemptions contained in FAR § 5.202(a) applies. Awards made pursuant to a schedule contract are not identified as a specific exception.

In another lifetime, the FAR and FIRMR required synopsis of schedule contract actions greater than $25,000. Under the then existing framework, GSA, through regulation, sought to increase the synopsis requirement to $50,000. GAO was asked to opine on the legality of the proposed regulation and determined that GSA did not have the authority to promulgate a synopsis level greater than the statutorily designated $25,000. *Letter to Hon. John Conyers, Jr.*, B-158766.16, 1989 WL 251138 (C.G.) Similarly, while an FSS Schedule may satisfy the requirements for full-and-open competition in certain circumstances, it's less than clear whether the synopsis requirement can be waived by regulation.

In *United Communications Systems, Inc.*, B-279383, 1998 WL 309853 (CG) a disappointed schedule contractor challenged the lack of synopsis for an award made to another schedule contractor. Although GAO refused to waive its timeliness requirement and dismissed the protest as untimely, the opinion indicates this is a significant issue. In this particular case GAO was unwilling to waive its timeliness requirement because the protestor had already benefited from the terms of this particular schedule contract as it had already received orders. Of course, it is impossible to predict what GAO would have done if the protestor had not been a schedule contractor, but there is every indication that this issue is ripe for a decision. Unfortunately, without the benefit of a synopsis, it may be a while before this issue is again presented to GAO for a decision.

Should such actions be synopsized? I believe that they should for three reasons: greater knowledge of the market by program officials and contracting officers, greater competition, and greater access to procurements for small businesses which may not have resources to compete for an FSS award. To

demonstrate the point, Tom Genovese, a contracting officer at SAO, recently completed a contract action for modems which coincidentally were included on an FSS schedule. The schedule contractor voiced strenuous objection to the Department's intent to issue a solicitation and wanted the Department to procure these items off its schedule. As it turns out, the competed price was significantly less than the schedule price. The Department's Office of Acquisition Management also notes that in a Census procurement a 26% price reduction was achieved under similar circumstances. Moreover, in *ATA* the Court noted that Schedule pricing was generally observed to be 20% greater than negotiated procurements. While it is now possible to negotiate a price reduction from the schedule contract, there is no substitute for competition.

As a cautionary note, if such price discrepancies do exist they will not go unnoticed for long—thus, promoting greater scrutiny and perhaps a legislative curb on discretion. CICA makes it clear that schedule contracting only satisfies the full-and-open competition requirements providing they represent the "lowest overall cost alternative." We need to make sure that the standard is achieved internally. If not, a significant benefit of procurement reform may be in danger of being reduced.

Conclusion

The availability of Schedules are a great resource to contracting officers and should not be discounted, but there is a balancing factor. Before considering a Schedule buy it would be wise for agencies to make a determination as to whether the increased Schedule costs offsets the administrative costs of issuing a solicitation or using simplified acquisition methods and that the lowest overall cost alternative is being achieved. The higher the procurement value, the greater the importance of such a determination. Otherwise, Mom and Dad will take away the procurement keys!

[1] FAR § 8.404(a).

[2] FAR § 8.404(b)(3).

[3] 28 U.S.C. § 1491(b).

[4] 15 U.S.C. § 637(e).

[5] 41 U.S.C. §416.