

MEMORANDUM FOR Acquisition Center

SUBJECT: New Developments in Task and Delivery Order Contracting

1. Protests against orders issued under task order contracts or delivery order contracts are limited by the Federal Acquisition Streamlining Act of 1994 (FASA), P.L. 103-355, to those filed on the basis that the order increases the scope, period, or maximum value of the contract. In an effort to balance that limitation on industry's right to protest, FASA provides that a "Task and Delivery Order Ombudsman" will review complaints from contractors in each agency that uses multiple award task order or delivery order contracts to ensure that all awardees receive a fair opportunity to be considered for task or delivery orders issued under the contract. The legislation provides, at 10 U.S.C. 2304c(e) and 41 U.S.C. 253j(e):

Each head of an agency who awards multiple task or delivery order contracts...shall appoint or designate a task and delivery order ombudsman who shall be responsible for reviewing complaints from the contractors on such contracts and ensuring that all of the contractors are afforded a fair opportunity to be considered for task or delivery orders when required...

2. A contractor may bring a complaint to the Task and Delivery Order Ombudsman if it believes that an acquisition does not conform with the terms of FAR Subpart 16.5 which prescribes the policies and procedures for making awards of indefinite-delivery contracts and "establishes a preference scheme for making multiple awards of delivery order contracts and task order contracts." Subpart 16.503(d) significantly limits the use of requirements type contracts for advisory and assistance services by directing that no solicitation for a requirements contract for such services in excess of three years and \$10,000,000 (including all options) may be issued unless the contracting officer or other official designated by the head of the agency determines in writing that the

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services required are so unique or highly specialized that it is not practicable to make multiple indefinite-delivery, indefinite-quantity (IDIQ) awards using the procedures in 16.504.

3. Except in those situations where the contracting officer or other official designated by the agency has determined the services to be necessarily incident to, and not a significant part of, the contract, the "multiple award preference" set forth at FAR Subpart 16.504(c) applies. The general preference at 16.504(c)(1) states

- ...the contracting officer shall, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources...If an indefinite-quantity contract for advisory and assistance services exceeds three years and \$10,000,000, including all options, multiple awards shall be made unless-
 - (A) The contracting officer or other official designated by the agency determines in writing, prior to the issuance of the solicitation, that the services required under the task order contract are so unique or highly specialized that it is not practicable to award more than one contract. This determination may also be appropriate when the tasks likely to be issued are so integrally related that only a single contractor can reasonably perform this work;
 - (B) The contracting officer or other official designated by the head of the agency determines in writing, after the evaluation of offers, that only one offeror is capable of providing the services required at the level of quality required; or
 - (C) Only one offer is received.

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If an indefinite-quantity contract for advisory and assistance services will not exceed three years and \$10,000,000, a contracting officer may, but is not required to, give preference to making multiple awards.

5. FASA gives contracting officers broad discretion in determining the procedures for providing contractors fair opportunity in competing for orders (in excess of \$2,500) issued under multiple delivery order contracts. Factors such as past performance, quality of deliverables, cost control, price, cost or other factors that the contracting officer, in the exercise of sound business judgment, believes are relevant may be considered. The procedures chosen by the contracting officer to insure fair opportunity to compete and the selection criteria must be set forth in the solicitation and contract. The competition requirements of FAR Part 6 need not be met; however, agencies may not use any method that would not result in fair consideration being given to all awardees prior to placing each order. Exceptions to the requirement to provide all offerors a fair opportunity to compete are set forth at FAR Subpart 16.505(b)(2), and include urgency, efficiency and satisfying guaranteed minimum order quantities.

6. In the one reported decision involving failure to comply with the FASA requirements for advisory and assistance services contracts, the General Accounting Office (GAO) upheld the protest of Nations, Inc. against the Army's Request for Proposals (RFP) contemplating award of a single requirements type contract rather than multiple indefinite-delivery, indefinite-quantity (IDIQ) type contracts for professional technical services in support of battlefield simulation training (Nations, Inc., B-272455, 1996 U.S. Comp. Gen. LEXIS 547; 96-2 Comp. Gen. Proc. Dec., 170). The protester alleged that a requirements type contract was precluded where, as here, the agency had not made a determination that the services were so unique or highly specialized that it was not practicable to make multiple IDIQ contract awards. The Army did not dispute the requirement to make such a determination where applicable, but asserted that training support services did not meet the definition of "advisory and assistance" services. GAO cited FAR Subpart 37.201 in its decision that training services did, in fact,

fall within the definition of "advisory and assistance" services, and stated further that

the umbrella-type task order contract to be awarded under this RFP appears to be the kind of contract targeted by Congress under FASA; the solicitation contemplates the award of a single contract for virtually all of the Army's requirements for support of computer simulation training at a large number of facilities throughout the United States. The Senate report regarding the relevant statutory provisions expressed a concern that:

"...the indiscriminate use of task order contracts for broad categories of ill-defined services necessarily diminishes competition and results in the waste of taxpayer dollars. In many cases, this problem can be effectively addressed...by awarding multiple task order contracts for the same or similar services..."

S. Rep. No. 103-258, 103d. Cong., 2d Sess. 15 (1994).

7. GAO held that because the training support services met the definition of "advisory and assistance" services set forth at FAR Subpart 37.203 (revised by FAC 90-41), the RFP was defective. The Comptroller General recommended that the Army either amend the solicitation to provide for the award of multiple IDIQ type contracts, or execute the necessary determination that the services sought were so unique or of such a highly specialized nature that it would not be practicable to make multiple awards. It was also recommended that the Army pay Nations, Inc.'s costs of filing and pursuing its protest, including reasonable attorneys' fees.

8. GAO's decision in *Nations, Inc., Id.*, illustrates a point made by John Cibinic in *The Nash and Cibinic Report*, Vol.10, No.1, January 1996. Mr. Cibinic stated his opinion that

Agencies have much to gain by making the ombudsman or agency protest approach work. Fighting protests consumes great amounts of time and money.

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9. The Task and Delivery Order Ombudsman for the Department of the Army is the Deputy Assistant Secretary of the Army (Procurement), Dr. Kenneth J. Oscar, who is also the Army's Competition Advocate General. AMC's Competition Advocate, Ms. Sandra Rittenhouse, and CECOM's Special Advocate for Competition, Ms. Michelina Darcy LaForgia, also serve as the Task and Delivery Order Ombudsman at their respective commands.

10. Point of Contact for this action is Michelina Darcy LaForgia at X25056.

11. CECOM Bottom Line: THE SOLDIER.

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