

# THE GOVERNMENT CONTRACTOR<sup>®</sup>



Information and Analysis on Legal Aspects of Procurement

Vol. 44, No. 41

November 6, 2002

## ***Focus***

---

¶ 431

### **FEATURE COMMENT: The Impact Of Multiple-Award Contracts On The Underlying Values Of The Federal Procurement System**

As the Department of Defense begins to implement competition requirements for task orders under multiple-award contracts, it may be useful to examine the role of competition in the federal procurement system and in the administration of multiple-award contracts. Along with high standards of individual and institutional integrity and system transparency, competition has been described as one of the fundamental premises of federal procurement. See, e.g., Judge Stephen M. Daniels, *An Assessment of Today's Federal Procurement System*, Office of Federal Procurement Policy Lecture Series (August 15, 2002), 44 GC ¶ 324; Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627 (2001). Nearly eight years of experience with multiple-award contracts, however, shows that all three premises have suffered to some extent in the name of increased efficiency. The question remains whether increased competition will rehabilitate the other two.

The Federal Acquisition Streamlining Act of 1994 (FASA) established a preference for multiple-award contracts. P.L. 103-355 (1994). In addition, with only limited exceptions, Congress barred protests of awards of task or delivery orders under such contracts. Protests are permitted only "on the grounds that the order increases the scope, period, or maximum value of the contract." See Federal Acquisition Regulation 16.505(a)(6). The underlying theory or expectation was that protests would not be needed in the competitive environment engendered by multiple awards.

Since that time, the number and use of multiple-award contracts has grown dramatically. See generally Raymond Fioravanti, *Multiple Award Task Order Contracts: Unique Opportunities, Unique Issues*, Briefing Paper No. 01-7 (June 2001) (noting that, at the time, over 40 Government-wide acquisition contracts were in effect). For example, sales of information technology products and services under Federal Supply Schedule 70 grew by 20% in Fiscal Year 2001, representing an increase of \$1.8 billion. In addition, the General Accounting Office's recent study of fees collected by agencies administering multiple-award contracts generally shows that awards have increased over the last three fiscal years. See *Contract Management: Interagency Contract Program Fees Need More Oversight*, GAO-02-734 (July 2002), 44 GC ¶ 346.

At the same time, GAO and the Inspectors General of DOD and the National Aeronautics and Space Administration have studied agency practices in awarding task and delivery orders. See, e.g., DOD Office of Inspector General, *Multiple Award Contracts for Services*, Report No. D-2001-189 (Sept. 30, 2001) (hereinafter "2001 DOD IG Report"), 43 GC ¶ 382; NASA Office of Inspector General, *Multiple-Award Contracts*, Report No. IG-01-040 (Sept. 28, 2001) (hereinafter "2001 NASA IG Report"); *Contract Management: Few Competing Proposals for Large DOD Information Technology Orders*, GAO/NSIAD-00-56 (March 20, 2000), 42 GC ¶ 119. Many of the reports' conclusions are well-known: approximately half of the task and delivery order awards reviewed were not subjected to competition, and agencies generally did not document adequately their decisions to make sole-source awards. These findings led Congress to impose competition requirements on DOD awards of task orders. National Defense Authorization Act for Fiscal Year 2002, P.L. 107-107,

---

This material reprinted from *The Government Contractor* appears here with the permission of the publisher, West Group. Further use without the permission of West Group is prohibited.

§ 803, 115 Stat. 1012 (2001). See generally Lt. Col. Steven N. Tomanelli, FEATURE COMMENT, “New Law Aims to Increase Competition for and Oversight of DOD’s Purchases of Services on Multiple Award Contracts,” 44 GC ¶ 107 (March 20, 2002). These requirements have recently been implemented in amendments to the Defense Federal Acquisition Regulation Supplement. See 44 GC ¶ 424. This Feature Comment examines whether competition provides the complete answer to the problems that plague multiple-award contracts.

**The Threats To Competition, Integrity, And Transparency In The Name Of Efficiency—**

Almost from the start, the lack of competition in task and delivery order awards has been highlighted in various reports. See, e.g., *Acquisition Reform: Multiple-Award Contracting at Six Federal Organizations*, GAO/NSIAD 98-215 (Sept. 1998); DOD Office of Inspector General, *DOD Use of Multiple Award Task Order Contracts*, Report No. 99-116 (April 2, 1999), 41 GC ¶ 182. These reports consistently note that absent competition, agencies lose “one of the best tools to ensure that the Government receives a fair and reasonable price.” 2001 DOD IG Report at 16; 2001 NASA IG Report at 4. The failure to solicit competition often is justified in the name of administrative efficiency.

Looking behind this justification, however, the reports have found that the lack of competition often resulted from pressure by end-users to use particular contractors and to generate business for contracts awarded by the agency. 2001 DOD IG Report at 10-11. In at least one case, an agency awarded task orders to contractors who identified a need for the work. 2001 DOD IG Report at 11-12. Such practices show a lack of integrity and transparency in the administration of multiple-award contracts. Thus, in addition to competition, agency practices under multiple award contracts threaten the remaining premises of the procurement system.

The intense scrutiny of multiple-award contracts has revealed that the values of integrity and transparency are threatened in other ways as well. First, the most recent DOD IG report discloses a number of situations illustrating the need for better acquisition planning. The report details two situations in which DOD components, relying on the preference for multiple-award contracts, made multiple awards knowing that com-

petition would not result in either because the “preferred contractor” had already been selected or because the agency knew that two contractors had agreed not to compete against each other. 2001 DOD IG Report at 13-14. Thus, agencies created the illusion of competition. In addition, poor planning resulted in competitions for task orders with relatively low initial dollar values even though the actual requirements (as expressed through subsequent task order modifications) were several times the initial values. Again, the appearance of competition was illusory. 2001 DOD IG Report at 13-14. These examples further illustrate that the values of integrity and transparency are not being served under the current regime of multiple award contracts.

Second, a recent GAO report shows that multiple award contracts may not be serving the goal of efficiency. The report notes that with the exception of two agencies, the fees collected by agencies that administer Government-wide acquisition contracts (GWACs) and the General Services Administration schedule contracts have significantly exceeded costs in recent years. See *Contract Management: Interagency Contract Program Fees Need More Oversight*, GAO-02-734 (July 2002), 44 GC ¶ 424. These findings are qualified only because it is not clear that agencies accurately track their costs of administering these programs. Because these fees were intended only to cover agency costs, agency users of these contracts may have been overcharged.

Thus, in addition to overpaying for goods and services through lack of competition, agencies are also overpaying because of the fees charged by other agencies. Moreover, this report identifies a fundamental flaw in applying notions of efficiency to Government agencies. If agencies are unable to track costs, they certainly will have difficulty in determining whether processes are “efficient” at least in terms of saving money.

**Reforms And Avenues For Relief—**Congress and the Office of Federal Procurement Policy have taken various steps to promote and ensure that agencies comply with the requirement to provide

---

This material reprinted from *The Government Contractor* appears here with the permission of the publisher, West Group. Further use without the permission of West Group is prohibited.

contractors with a “fair opportunity for consideration” for award of task or delivery orders. These steps include: (1) OFPP’s establishment of performance guidelines to compete 90% of orders over \$2,500 for three agencies (see *Acquisition Reform: Multiple-Award Contracting at Six Federal Organizations*, GAO/NSIAD 98-215, at 2 (Sept. 1998) (noting that OFPP had established the guidelines)), and (2) Congress’ recent direction to require additional planning and analysis prior to awarding task or delivery orders. National Defense Authorization Act for Fiscal Year 2000, P.L. 106-65, § 804, 113 Stat. 512, 704 (Oct. 5, 1999). This legislation has been implemented by two amendments to the FAR. 67 Fed. Reg. 56117 (Aug. 30, 2002) (requiring the development of acquisition plans before placing task or delivery orders), 44 GC ¶ 349; and 65 Fed. Reg. 24317 (April 25, 2000) (addressing considerations for awarding multiple-award contracts and placing orders), 42 GC ¶ 174.

Congress’ latest effort has been to impose competition requirements on DOD task orders over \$100,000. In April 2002, DOD issued a proposed rule that defines procedures for providing contractors with a “fair opportunity for consideration.” 67 Fed. Reg. 15351 (April 1, 2002), 44 GC ¶ 133. DOD recently issued the final rule, which imposes limited competition requirements on orders for services in excess of \$100,000 placed under GSA schedule contracts, GWACs, and other multiple-award contracts. 67 Fed. Reg. 65505 (Oct. 25, 2002), 44 GC ¶ 424. It remains to be seen, however, whether these new regulations will enhance competition because agencies often have disregarded the existing FAR provisions, which require “fair opportunity” and limit the use of sole-source awards.

A recent case suggests that the disputes process may provide an avenue for contractors to enforce the “fair opportunity” requirements. In *Community Consulting International*, ASBCA 53489, 2002-2 BCA ¶ 31,940, 44 GC ¶ 329, the Armed Services Board of Contract Appeals held that a contractor could pursue a claim for an agency’s breach of its duty to provide a fair opportunity to compete for task orders. Although the agency had satisfied its obligation to order the minimum quantity from the contractor, the ASBCA held that the duty to provide a fair opportunity was independent of the minimum quantity and part of

the agency’s implied duty of good faith. Thus, assuming that contractors can overcome the difficult burden of establishing damages, agencies may face potential liability if they continue to ignore the relatively modest requirements for competition.

**Efficiency: Fact Or Fiction?**—With all of the threats to the premises of the system posed by multiple award contracts, it appears that the only consistent benefit offered by such contracts is administrative efficiency. Indeed, in responding to report findings, ordering agencies often resist competition goals and other processes on the grounds of efficiency. See, e.g., 2001 DOD IG Report at 29 (setting forth DFAS’ objection to the IG’s recommendation of setting a goal of competing 75% of task orders). Thus, it is important to examine the role and importance of efficiency in the federal procurement process.

First, Congress, in enacting FASA, certainly intended to increase efficiency in the procurement process but not at the expense of the other premises. The legislative history of FASA, however, indicates Congress’ intent that the primary objectives of FASA “would be accomplished without undermining the key features of the current procurement statutes, such as *full and open competition*.” S. Rep. No. 103-258, at 3 (reprinted in 1994 U.S.C.C.A.N. 2561, 2563) (emphasis added).

Second, in the related area of contract bundling, Congress has determined that administrative efficiency is not the highest priority. “The reduction of administrative or personnel costs alone shall not be a justification for bundling of contract requirements unless the cost savings are expected to be substantial in relation to the dollar value of the procurement requirements to be consolidated.” 15 U.S.C. § 644(e)(2)(C).

A recent case illustrates this principle. In *Vantex Service Corporation*, Comp. Gen. B-290415, 2002 CPD ¶ 131, 44 GC ¶ 339, GAO upheld a protest against bundling of latrine and waste removal services. GAO noted that “[the Competition in Contracting Act] and its implementing regulations require that the scales be tipped in favor of en-

---

This material reprinted from *The Government Contractor* appears here with the permission of the publisher, West Group. Further use without the permission of West Group is prohibited.

suring full and open competition, whenever concerns of economy or efficiency are being weighed against ensuring full and open competition.” In this case, GAO found that the “agency’s justification . . . essentially amounts to reliance on administrative convenience as the basis for the bundling.” Thus, in the context of bundling, interests of efficiency are subservient to the interests of full and open competition, in part, because it supports the Government’s goal of promoting small businesses.

Third, efficiency is often evaluated in terms of saving time and money. Although it is clear that agencies can save some time by foregoing competition in awarding task or delivery orders, it is not clear that they are saving money. There are two areas where the absence of modest competitive procedures can cost money. With respect to the goods and services ordered under multiple-award contracts, the lack of competition makes it likely that agencies are not paying fair and reasonable prices. With regard to the contracts themselves, user agencies may be paying the administering agencies in excess of actual costs, and administering agencies may or may not be covering their costs. Thus, administrative efficiency—the supposed hallmark of multiple-award contracts— may be fiction rather than fact.

**Impact On Contractors**—Apart from philosophical considerations about the procurement system as a whole, it is important to consider how the current regime affects contractors. Although certain contractors in certain circumstances benefit from not having to compete because they are the “preferred” or “incumbent” contractors, it is not clear that the majority of contractors find themselves in this situation. Thus, a large number of contractors may have expended substantial resources to obtain an award under a multiple award scheme only to discover that they can expect only to recover the guaranteed minimum.

Moreover, the only recourse for contractors on the outside looking in is to submit a claim that the agency breached its obligation to provide “a fair opportunity to be considered” for award of additional task or delivery orders. The damages for such a claim may be difficult to prove, requiring complex evidence about the likelihood of success and potential profits on other task orders. In short, contractors—other than those currently

in favor—have reason to be concerned about the current regime of multiple award contracts.

**Conclusion**—In light of all of these threats to the procurement system and its community, the question becomes what can be done to rehabilitate competition, integrity, and transparency without sacrificing too much efficiency. The new competition requirements for DOD task orders may be a step in the right direction. If they are followed by agencies, the regulations will contribute not only to competition but integrity and transparency as well.

If these new regulations are not followed (and recent history suggests that this is a legitimate question), it may be necessary to revisit the bar on protests. Although some may claim that allowing protests of task or delivery orders will eliminate the benefits of multiple award contracting, one need only look at the GSA schedule program to know that this should not be the case. Since the statutory bar on protests of task and delivery order was passed, it has not applied to awards under schedule contracts. See, e.g., *Severn Companies, Inc.*, Comp. Gen. B-275717.2, 97-1 CPD ¶ 181. See generally Robert J. Sherry & Thomas F. Burke, FEATURE COMMENT, “*The New Wave of MAS Protests*,” 39 GC ¶ 432 (Sept. 5, 1997). Despite this fact, GSA’s schedules program has thrived, and schedule sales have continued to grow.

Even if protests are not the answer, Congress, OFPP, and the procurement community will need to examine the fundamental bases for using multiple-award contracts if the abuses are not corrected. Industry should favor modest reforms lest the abuses cause the pendulum to swing too far the other way.



**This FEATURE COMMENT was written for The Government Contractor by Thomas F. Burke and C. Stanley Dees of the law firm of McKenna Long & Aldridge LLP. Messrs. Burke and Dees are partners in the government contracts department resident in the firm’s Washington, DC office.**

---

This material reprinted from *The Government Contractor* appears here with the permission of the publisher, West Group. Further use without the permission of West Group is prohibited.