

The Anatomy of a Bid Protest

New Strategies for Challenging
FSS orders in Light of *IDEA
International v. U.S.*

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The Anatomy of a Bid Protest

Welcome and Introductions



Moderator – Larry Allen (Executive Vice President, The Coalition for Government Procurement)



Speaker – Richard Oliver (Partner, McKenna Long & Aldridge, LLP)



Speaker – Jason Workmaster (Associate, McKenna Long & Aldridge, LLP)

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Welcome and Introductions

Topics to be Covered

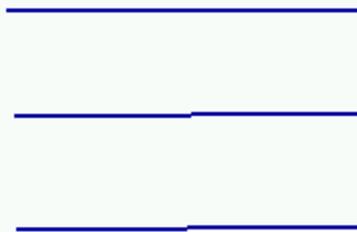
- Can you protest a task or delivery order under an FSS contract?
- What are the pitfalls of filing a protest?
- What results can I expect from a successful protest?
- What are the strategies when filing a protest?

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Topics to be Covered

GSA's Federal Supply Schedule ("FSS") Program

- Commercial items – goods and services
- Multiple-award
- Most-favored-customer ("MFC") pricing
- Services often priced on labor-hour basis



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GSA's Federal Supply Schedule ("FSS") Program

GSA's FSS Program (cont'd)

- **Delivery orders (goods) or task orders (services)**
- **Ordering procedures established in FAR Subpart 8.4 (as compared to FAR Part 15)**
 - Possibility of blanket purchase agreements
 - Ordering agencies, in general, must consider at least three schedule contractors
 - No entitlement to a debriefing
- **Increasingly used to order services requiring a statement of work, issued by ordering agency as part of a request for quotation ("RFQ")**

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GSA's FSS Program (cont'd)

Federal Acquisition Streamlining Act (“FASA”) Protest Prohibition

- FASA enacted in 1994
- Created/codified authority to enter into “task or delivery order contracts”
- Requires multiple-award task or delivery order contracts to include “fair opportunity” procedures

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Federal Acquisition Streamlining Act (“FASA”) Protest Prohibition

FASA Protest Prohibition (cont'd)

- **Protest prohibition – “A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.” 10 U.S.C. § 2304c(d)**
- **Prohibition applies to contracts entered into under the authority of FASA. 10 U.S.C. § 2304c(f)**
- **Question: Are FSS contracts entered into under authority of FASA? No – Preexisting authority of GSA to enter into FSS contracts not codified in FASA.**

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FASA Protest Prohibition (cont'd)

Evolving Case Law

- **Government Accountability Office (“GAO”) position**
 - *Severn Cos., Inc., B-275717 et al.*, April 28, 1997, 97-1 CPD ¶ 181 found FASA protest prohibition does not apply to protests regarding FSS orders
- **Court of Federal Claims (“COFC”) position**
 - *Labat-Anderson v. U.S.*, 50 Fed. Cl. 99 (2001), in dicta, stated that FASA protest prohibition does not apply to protests regarding FSS orders
 - *Group Seven Assocs. v. U.S.*, 68 Fed. Cl. 28 (2005), in dicta, stated that FASA protest prohibition appears to apply to FSS orders
 - *IDEA Int'l v. U.S.*, 74 Fed. Cl. 129 (2006), held that FASA protest prohibition does not apply to protests regarding FSS orders
- **No appellate decision on this issue from the Federal Circuit**

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Evolving Case Law

Application of FASA Protest Prohibition Outside FSS Context

- Agency use of “task or delivery order contracts” other than FSS contracts
 - No debate that FASA protest prohibition generally applies to “task or delivery order contracts” outside of FSS program
 - Evidence that agencies now trying to structure procurements to take advantage of protest prohibition: *Palmetto GBA, LLC*, B-299154, Dec. 19, 2006; *ACS Fed'l Healthcare, LLC*, B-299280, Jan. 16, 2007
 - Must conduct careful initial reviews of solicitations to determine potential protest rights

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Application of FASA Protest Prohibition Outside FSS Context

Available Fora for Protests Relating to FSS Orders

- **Agency**
 - **Most likely the least threatening forum**
 - **“Solicitation defect” protests must be filed before bid opening or the closing date for receipt of proposals**
 - **All other protests must be filed within 10 days of when protester knew or should have known of grounds**
 - **Question whether debriefing “safe harbor” is ever available for agency-level protest**
 - **Even if “safe harbor” otherwise available, “safe harbor” not available when protesting FSS orders**

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Available Fora for Protests Relating to FSS Orders

Available Fora for Protests Relating to FSS Orders (cont'd)

- **Agency (cont'd)**
 - Can request independent review of protest at a level above the contracting officer
 - No right to review contract file
 - No right to a hearing
 - Should receive decision within 35 days of filing

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Available Fora for Protests Relating to FSS Orders (cont'd)

Available Fora for Protests Relating to FSS Orders (cont'd)

- **Agency (cont'd)**
 - **Automatic stay of contract award in pre-award setting**
 - **Agency can override stay**
 - **Protester can challenge override decision at COFC**
 - **Automatic stay of contract performance in post-award setting**
 - **Protester cannot rely on debriefing "safe harbor"—must file protest within 10 days of award**
 - **Agency can override stay**
 - **Protester can challenge override decision at COFC**

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Available Fora for Protests Relating to FSS Orders (cont'd)

Available Fora for Protests Relating to FSS Orders (cont'd)

- **Agency (cont'd)**
 - **Relief**
 - **Refrain from exercising options**
 - **Terminate contract**
 - **Recompete contract**
 - **Issue new solicitation**
 - **Award a contract consistent with statute and regulation**
 - **Bid and proposal costs**
 - **Costs of pursuing protest (including attorney and consultant fees, subject to statutory cap)**
 - **Statutory cap does not apply to small business concerns**
 - **No "appeal" from adverse decision on agency-level protest**
 - **Can go to GAO or COFC and "start over" again**

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Available Fora for Protests Relating to FSS Orders (cont'd)

Available Fora for Protests Relating to FSS Orders (cont'd)

- **GAO**
 - **Can follow unsuccessful agency-level protest**
 - **Agency protest must have been timely**
 - **Protester must file at GAO within 10 days of initial adverse agency action on agency protest**
 - **Protester can go straight to GAO without going to agency first**
 - **"Solicitation defect" protests must be filed before bid opening or the closing date for receipt of proposals**
 - **All other protests must be filed within 10 days of when protester knew or should have known of grounds**
 - **No debriefing "safe harbor" when protesting FSS orders**

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Available Fora for Protests Relating to FSS Orders (cont'd)

Available Fora for Protests Relating to FSS Orders (cont'd)

- **GAO (cont'd)**
 - Right to request documents and review contract file (typically under “protective order”)
 - Possibility of a hearing
 - Statutory requirement that GAO issue a decision within 100 days of filing of protest

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Available Fora for Protests Relating to FSS Orders (cont'd)

Available Fora for Protests Relating to FSS Orders (cont'd)

- **GAO (cont'd)**
 - **Automatic stay of contract award in pre-award setting**
 - **Agency can override stay**
 - **Protester can challenge override decision at COFC**
 - **Automatic stay of contract performance in post-award setting**
 - **Protester cannot rely on debriefing "safe harbor"—must file protest within 10 days of award**
 - **Agency can be override stay**
 - **Protester can challenge override decision at COFC**

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Available Fora for Protests Relating to FSS Orders (cont'd)

Available Fora for Protests Relating to FSS Orders (cont'd)

- **GAO (cont'd)**
 - **Relief**
 - **Refrain from exercising options**
 - **Terminate contract**
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 - **Issue new solicitation**
 - **Award a contract consistent with statute and regulation**
 - **Bid and proposal costs**
 - **Costs of pursuing protest (including attorney and consultant fees, subject to statutory cap)**
 - **Statutory cap does not apply to small business concerns**
 - **No "appeal" from adverse decision on GAO protest**
 - **Can go to COFC and "start over" again**
 - **29% sustain rate last year (highest ever)**

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Available Fora for Protests Relating to FSS Orders (cont'd)

Available Fora for Protests Relating to FSS Orders (cont'd)

- **COFC**
 - **Can follow unsuccessful agency-level and/or GAO protest**
 - **No strict "prior to receipt of proposals" or "10-day" timeliness rules; doctrine of "laches" applies**
 - **Possibility of discovery and cross-examination of agency officials**
 - **No statutory or regulatory requirement that a decision be issued within a specific period of time**
 - **No entitlement to an automatic stay of contract award or performance—must request a temporary restraining order and/or preliminary injunction to maintain the status quo during the pendency of the court action**

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Available Fora for Protests Relating to FSS Orders (cont'd)

Available Fora for Protests Relating to FSS Orders (cont'd)

- **COFC (cont'd)**
 - **Relief governed by “equitable” principles and “case law”**
 - **Refrain from exercising options**
 - **Terminate contract**
 - **Recompete contract**
 - **Issue new solicitation**
 - **Award a contract consistent with statute and regulation**
 - **Bid and proposal costs**
 - **Recovery of attorney fees typically limited to small businesses under the Equal Access to Justice Act**
 - **Can appeal adverse decision to Federal Circuit**

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Available Fora for Protests Relating to FSS Orders (cont'd)

Potential Protest Grounds

- **Increasing use of schedules to order advisory/consultant services raises possibility of organizational conflicts of interest (“OCIs”)**
 - Recent GAO developments suggest rebirth of GAO “deference” in this area: *Alion Science & Tech. Corp.*, B-297022.4 *et al.*, Sept. 26, 2006; *Maden Techs.*, B-298543.2, Oct. 30, 2006; *Overlook Systems Techs., Inc.*, B-298099.4 *et al.*, Nov. 28, 2006
- **IDEA Int’l suggests that, if an FSS contractor is using a subcontractor to provide services, that subcontractor must also have those services on an FSS schedule**
- **Consistency of evaluation with stated evaluation criteria**
 - Question of applicability of FAR Part 15

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Potential Protest Grounds

**If you have any additional
questions, please feel free to
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