

Legal Corner

COFC Holds That It Has Jurisdiction to Hear Protests Relating to the Issuance of Orders Under FSS Contracts

For decades, the General Services Administration (GSA) has awarded Federal Supply Schedule (FSS) contracts under which agencies throughout the Federal Government could place orders using limited competition. In recent years, these FSS contracts increasingly have been used to procure sophisticated services (as opposed to just goods), with task orders sometimes valued at tens of millions of dollars. In fact, the "limited" competitions for FSS orders sometimes resemble typical FAR Part 15 procurements, with detailed proposal instructions and evaluation criteria. When offerors have protested the award of task or delivery orders under FSS contracts, the Government Accountability Office (GAO) routinely has heard the merits of those protests, reviewing the reasonableness of the award decision and its consistency with the announced evaluation scheme.

In 1994, Congress passed the Federal Acquisition Streamlining Act (FASA). Among other things, FASA encouraged the use of multiple-award indefinite quantity "task or delivery order contracts" and provided a generic source of statutory authority for such contracts. (See 10 U.S.C. § 2304a; 41 U.S.C. § 253h.) Under task or delivery order contracts entered into under FASA, task or delivery orders would subsequently be issued using procedures that would guarantee a "fair opportunity" to compete for all holders of the contracts. (10 U.S.C. § 2304c; 41 U.S.C. § 253j.) FASA also limited the ability to protest the issuance of orders under these contracts, stating: "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 the order issued." (10 U.S.C. § 2304c(d); 41 U.S.C. § 253j(d).) FASA made clear that the statutory provisions containing this limitation "apply]" only to "task and delivery order contracts entered into under" the authority codified in FASA. (10 U.S.C. § 2304c(f); 41 U.S.C. § 253j(f).)

In 1997, GAO considered whether the FASA protest bar applied to protests relating to the issuance of orders under FSS contracts — which, on their face, could be considered "task or delivery contracts" as defined by FASA — and found that it did not. (See *Severn Cos., Inc.*, B-275717, 97-1 CPD ¶ 181.) In a 2001 case, the Court of

Federal Claims (COFC) also stated (albeit in dicta) that the FASA protest bar did not apply to such protests. (See *Labat-Anderson Inc. v. United States*, 50 Fed. Cl. 99 (2001).) In the fall of 2005, however, the COFC revisited this issue and stated (again in dicta) that the FASA protest bar made it "doubtful" that the court had subject matter jurisdiction to hear protests relating to the issuance of task and delivery orders under FSS contracts (other than protests alleging that an order increased the scope, period, or maximum value of the underlying FSS contract). (*Group Seven Associates, LLC v. United States*, 68 Fed. Cl. 28 (2005).) Despite finding jurisdiction doubtful, the Group Seven court went on to address the merits of the case.

Since Group Seven, the government contracting community has been anticipating the COFC case that would squarely address this jurisdictional issue. The wait is over, and the case is *IDEA International, Inc. v. United States*, Nos. 06-652C, 06-717C (Fed. Cl. Dec. 1, 2006). In *IDEA International*, the COFC has now explicitly held that it does have jurisdiction to hear protests relating to orders issued under FSS contracts. Relying on a textual analysis of FASA and the FAR regulations that implemented it (FAR Subpart 16.5), the court found that the FASA protest bar did not apply because the FSS contracts at issue in the case were not entered into under the authority of FASA, i.e., they were entered into pursuant to the GSA Administrator's pre-existing authority for the FSS program.

The COFC's decision in *IDEA International* is based on a simple but compelling analysis of the relevant statutory language. Unless the Government elects to pursue an appeal, the decision should remove the jurisdictional uncertainty that followed Group Seven. Disappointed offerors filing protests of schedule awards at GAO should bear in mind, however, that these procurements are still subject to special rules established under FAR Subpart 8.4 (rather than the full panoply of Part 15 rules) and that both the GAO and the COFC have held that there is no right to a debriefing on the award of a schedule order. This impacts a protester's deadlines for filing a timely GAO protest as well as obtaining an automatic stay of performance during the pendency of the protest.

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