

Analysis & Perspective

Task and Delivery Order Contracts

Protests of Task and Delivery Orders under Multiple Award Contracts: Conflicting Authority for Protests of Orders under GSA Schedule Contracts And Proposals to Expand Protest Jurisdiction for Other Multiple Award Contracts

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The arrival of a new Congress has generated a wave of proposals for reforming federal procurement law. Many of those proposals appear, in effect, to be intended to repeal or scale back many of the much-heralded procurement reforms implemented in the 1990s pursuant to the Federal Acquisition Streamlining Act of 1994 and the Federal Acquisition Reform Act of 1995.

An example of this involves the statutory prohibition against any protest challenging the award of a task or delivery order issued under an indefinite delivery, indefinite quantity (IDIQ) multiple award contract. Enacted in the mid-1990s, this bid protest prohibition was intended to encourage the use of multiple award contracts and streamline the acquisition process by removing the protest hurdle from that process. Since its enactment, however, decisions from both the Government Accountability Office (GAO) and the U.S. Court of Federal Claims have interpreted the statute narrowly and have carved out an exception for bid protests of task and delivery orders issued against General Services Administration (GSA) Federal Supply Schedule (FSS) contracts. Another decision from the Court of Federal Claims, however, has questioned whether any exception exists to the statutory bid protest bar, causing an apparent split of authority at the court over its jurisdiction.

Moreover, with the expanding use of multiple award IDIQ contracts a decade after the enactment of FASA, some policymakers and courts have criticized this statutory prohibition as going too far and as removing an important tool to maintain the integrity of the procurement process. As a result, there are a number of pending proposals to scale back the current statutory bar against protests and allow multiple award IDIQ contract-holders to protest the issuance of task and delivery orders.

This article will provide an overview of the cases narrowly interpreting the statute to exclude GSA schedule contracts from the statutory bid protest bar. Although

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most of these cases have reached the same result in finding bid protest jurisdiction, the opinions have taken different routes to get there, suggesting that the law is far from clear. This article also will discuss the current proposals to scale back the statutory prohibition and expressly permit the Court of Federal Claims and GAO to hear protests of orders issued against multiple award IDIQ contracts. Given the lack of consistency in the decisions to date addressing the protest bar's applicability to orders issued against GSA schedule contracts, legislative efforts to clarify the scope of the protest bar also should consider addressing protests of GSA schedule task orders to resolve the current split in authority at the Court of Federal Claims.

The Federal Acquisition Streamlining Act

Congress adopted the statutory prohibition against protests of task and delivery orders under IDIQ contracts as part of the wave of federal procurement reform in the mid-1990s. In 1994, Congress passed the Federal Acquisition Streamlining Act (FASA or the Act),¹ explaining that it was intended to reform federal procurement activities "by greatly streamlining and simplifying [the federal government's] buying practices."²

Among the many provisions of the Act, FASA included general authorization for military and civilian procuring agencies to use task and delivery order contracts to acquire goods and services through IDIQ contracts and established a statutory preference for awarding such contracts for the same or similar services or property to more than one source, in so-called multiple award contracts.³ With a few exceptions, the Act required that, when awarding task or delivery orders under multiple award contracts, procuring agencies must provide competitors a "fair opportunity to be considered" for award of the task or delivery order.⁴

Despite requiring agencies to provide offerors a "fair opportunity to be considered," the Act also included a

¹ Pub. L. No. 103-355, 108 Stat. 3243 (1994). FASA's task and delivery order provisions are codified identically at 10 U.S.C. §§ 2304a-2304d for defense agencies and 41 U.S.C. §§ 253h-253k for civilian agencies. This article cites the provisions at Title 10 of the United States Code.

² 140 Cong. Rec. 24,864, 24,865 (1994) (statement of Rep. Conyers).

³ 10 U.S.C. § 2304a(d)(3).

⁴ 10 U.S.C. § 2304c(b).

provision prohibiting protests of such task or delivery order awards.⁵ The Act provides that “[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.”⁶

In terms of the statutory prohibition against protests of such orders, there does not appear to be any dispute that FASA’s so-called “task order bid protest bar” generally precludes the protest of task or delivery orders issued against multiple award IDIQ contracts, except for the narrow category of protests challenging an order as exceeding the scope, period, or maximum value of the master IDIQ contract.⁷ GAO and the courts, however, have struggled with whether the FASA protest bar was intended to preclude protests of task or delivery orders issued against GSA FSS contracts.

GSA FSS contracts are similar to multiple award IDIQ contracts authorized under FASA. Under the FSS program, offerors submit proposals to the GSA for their products and services to be included on the FSS and GSA essentially issues multiple award IDIQ contracts against which agencies can place task or delivery orders. This similarity to FASA IDIQ multiple award contracts has raised questions as to the intended scope of FASA’s bid protest bar.

Case Law Addressing FASA

GAO. GAO was the first forum to address the application of the FASA protest bar to orders issued under GSA schedule contracts. In *Severn Cos.*,⁸ a disappointed bidder filed a protest challenging the cancellation of a delivery order issued against the protester’s GSA schedule contract after the agency determined that the solicitation was ambiguous. The awarding agency contended that GAO’s consideration of the protest was precluded by the FASA protest bar.

In a footnote, GAO addressed its jurisdiction in light of FASA. GAO found the government’s argument unpersuasive “since we find no evidence that [the FASA] provision is intended to preclude protests with respect to the placement of orders against GSA FSS contracts.”⁹ GAO relied on the “legislative history” of the provisions generally authorizing the use of multiple award IDIQ contracts to conclude that Congress intended to encourage the use of multiple award order contracts. GAO reasoned that such an incentive was not required for the GSA schedule program “since it already afforded users a choice of multiple contractors.”¹⁰ Moreover, GAO pointed out that Federal Acquisition Regulation (FAR) Subpart 16.5 “treats FSS contracts as separate from other indefinite delivery contracts” by providing that FAR Part 16 does not restrict the authority of the GSA to issue schedule contracts under any other provision of law.¹¹ Thus, the

GAO concluded that this “supports the interpretation that the [protest] restriction was not intended to apply to the FSS.”¹²

In a subsequent case before GAO, *Labat-Anderson Inc.*, the awardee asked GAO to reconsider its “position that [GAO has] jurisdiction over protests where the solicitation anticipates the issuance of task orders placed under GSA schedule contracts.”¹³ There, GAO explained that it “reviewed our rationale for assuming jurisdiction over such protests, as set forth in *Severn Cos.*, and find no basis to change our position.”¹⁴ Since then, GAO has recognized its jurisdiction of protests related to orders under GSA FSS contracts often without discussing FASA.¹⁵

Court of Federal Claims. As discussed above, GAO reaffirmed its jurisdiction to hear protests of orders against GSA schedule contracts in *Labat-Anderson*, and that protest proceeded to the Court of Federal Claims. At the court, the plaintiff in *Labat-Anderson* protested the award of a Blanket Purchase Agreement (BPA) after a competition among companies with schedule contracts for certain document management services.¹⁶ The awardee-intervenor moved to dismiss for lack of jurisdiction, relying in part on FASA’s prohibition on protests of task or delivery order awards.¹⁷ As a preliminary matter, the court held that the Tucker Act¹⁸ provided the court jurisdiction to review procurements conducted pursuant to FAR Part 8.

In addressing the FASA prohibition, Judge Sarah Wilson provided two explanations in support of finding jurisdiction. The court first emphasized that this procurement resulted in the award of a BPA—“a vehicle against which task orders will be placed” and, therefore, more akin to a master IDIQ contract.¹⁹ Since a “BPA is not a task order,” the court held that the FASA prohibition, by its terms, did not apply.²⁰

The court next considered regulations under FAR Part 16 and the regulatory history. The court noted that FAR 16.500(c), which incorporates FASA’s bid protest bar, provides that: “Nothing in this subpart restricts the authority of the General Service Administration (GSA) to enter into schedule, multiple award, or task or delivery order contracts under any other provision of law. Therefore, GSA regulations and the coverage for the Federal Supply Schedule program in Subpart 8.4 and Part 38 take precedence over this Subpart [16.5].”²¹ The court further noted that the regulatory history accompanying FAR Part 16 also explains that

¹² *Id.*

¹³ B-287081 et al., 2001 C.P.D. ¶ 79 at 5 n.1 (Apr. 16, 2001), 75 FCR 455 (May 1, 2001).

¹⁴ *Id.*

¹⁵ See, e.g., *The MIL Corp.*, B-297508 et al., 2006 C.P.D. ¶ 34 at 4 (Jan. 26, 2006) (“When an agency conducts a formal competition under the FSS program for award of a task order contract, we will review the agency’s actions to ensure that the evaluation was reasonable and consistent with the terms of the solicitation.”).

¹⁶ *Labat-Anderson Inc. v. United States*, 50 Fed. Cl. 99 (2001), 76 FCR 158 (Aug. 7, 2001).

¹⁷ The court’s opinion does not indicate whether the United States joined in the intervenor’s motion to dismiss based on FASA.

¹⁸ 28 U.S.C. § 1491.

¹⁹ *Id.* at 105.

²⁰ *Id.*

²¹ *Id.* at 105 (quoting FAR 16.500(c)) (alteration in original).

⁵ 10 U.S.C. § 2304c(d).

⁶ *Id.*

⁷ See, e.g., *Labat-Anderson Inc. v. United States*, 50 Fed. Cl. 99, 104 (2001), 76 FCR 158 (Aug. 7, 2001) (“[T]he plain language of the statutory provision clearly bars task order protests. . .”).

⁸ B-275717, et al., 97-1 C.P.D. ¶ 181 (April 28, 1997).

⁹ *Id.* at 2 n.1.

¹⁰ *Id.*

¹¹ *Id.*

“ [c]ontracts subject to Part 38 were exempted from coverage because [FASA] specifically exempted GSA’s Federal Supply Schedule Program.”²² Accordingly, the court in *Labat-Anderson* discerned from this language an intent to treat GSA FSS contracts differently and held that “the language and regulatory history of FAR Part 16 support the interpretation that the task order restriction was not intended to apply to FSS procurements.”²³

The Court of Federal Claims next addressed its jurisdiction to hear a task order protest under the GSA schedule contracts in *Group Seven Associates v. United States*, and, there, Judge Eric Bruggink questioned the court’s jurisdiction to hear such protests.²⁴ The protest challenged the award of a task order issued to a GSA schedule contract-holder after the Defense Department conducted a competition among schedule holders. Citing the FASA prohibition, the United States moved to dismiss for lack of jurisdiction. The court first noted that, unlike *Labat-Anderson*, the procurement at issue clearly resulted in the award of a task order, not a BPA, so the first element of *Labat-Anderson*’s analysis was not applicable. The court next briefly addressed *Labat-Anderson*’s second rationale—“that FASA does not apply to GSA FSS contracts. . . .”²⁵ The *Group Seven* court called this conclusion “problematic” and “less than compelling.”²⁶ Although *Labat-Anderson* had relied on regulations under FAR Part 16, the *Group Seven* court reasoned that FASA’s statutory language “does not suggest any exceptions,” and, as a result, “jurisdiction . . . is doubtful.”²⁷ The court nonetheless assumed jurisdiction and addressed the merits of the protest.

Although Judge Bruggink proceeded to consider the merits of the protest by assuming jurisdiction in *Group Seven*, he strongly suggested that the Court of Federal Claims has no jurisdiction under FASA to entertain protests of task orders issued against GSA schedule contracts. Not only did Judge Bruggink question the conclusion reached in *Labat-Anderson* but, by implication, he questioned GAO’s conclusion in *Severn Cos.* that it had jurisdiction to hear such protests in light of the FASA bid protest bar.

Against this backdrop, the issue arose once again before the court in *IDEA International Inc. v. United States*.²⁸ There, the court considered a protest challenging the award of a task order issued against a GSA schedule contract for information technology professional services to provide a home school program for dependents of active duty military and DOD civilians located overseas. The United States again argued that the court lacked jurisdiction based on FASA’s bid protest bar. In applying an analysis different from and more detailed than *Severn Cos.* and *Labat-Anderson*, Judge Thomas Wheeler concluded that this provision of FASA “is not intended to apply to protests relating to the placement of orders under GSA [FSS] contracts.”²⁹

²² *Id.* (quoting 61 Fed. Reg. 39,201, 39,202 (July 26, 1996)) (alteration in original).

²³ *Id.*

²⁴ 68 Fed. Cl. 28 (2005), 84 FCR 431 (Oct. 25, 2005).

²⁵ *Id.* at 32.

²⁶ *Id.*

²⁷ *Id.*

²⁸ 74 Fed. Cl. 129 (2006), 86 FCR 614 (Dec. 19, 2006).

²⁹ *Id.* at 135.

First, Judge Wheeler relied on a provision of FASA, not previously considered, which provides that “[t]his section [including the prohibition on bid protests] applies to task and delivery order contracts entered into under sections 2304a and 2304b of this title.”³⁰ Judge Wheeler found that the GSA schedule contracts at issue were not entered into under 10 U.S.C. §§ 2304a or 2304b, but pursuant to separate statutory authority for GSA’s FSS program, which preexisted FASA.³¹

Second, Judge Wheeler found that “FASA itself recognizes that GSA’s Federal Supply Schedule program is not affected by FASA,” as FASA provides that “[n]othing in this section may be construed to limit or expand any authority of the head of an agency or the Administrator of General Services to enter into schedule, multiple award, or task or delivery order contracts under any other provision of law.”³² In Judge Wheeler’s view, this language at Section 2304a(g) confirmed that Congress intended for the schedule program to remain separate and distinct from the new FASA authority and “demonstrate[d] that Congress understood the difference between GSA Schedule contracts and task or delivery order contracts. . . .”³³ Because the prohibition on bid protests in 10 U.S.C. § 2304c(d) made “no mention of orders under ‘schedule contracts,’” Judge Wheeler determined that Congress did not intend to impose this protest prohibition on GSA schedule contracts.³⁴

Third, Judge Wheeler found that the FAR supported a distinction between FASA multiple award contracts and GSA schedule contracts. For example, he noted that although FAR Subpart 16.5 repeated FASA’s prohibition on bid protests,³⁵ this same subpart explicitly provided that: “[n]othing in this subpart restricts the authority of the [GSA] to enter into schedule, multiple award, or task or delivery order contracts under any other provision of law” and that GSA regulations and FAR Parts 8.4 and 38 for the Federal Supply Schedule “take precedence over” FAR Part 16 addressing the FASA IDIQ contracts.³⁶ According to the court, the introductory material accompanying the FAR rule explained that “FSS contracts ‘were exempt from coverage [by FAR Subpart 16.5] because [FASA] specifically exempted GSA’s Federal Supply Schedule Program.’”³⁷ Judge Wheeler viewed these regulations and their regulatory history as providing further support for a distinction between FASA IDIQ and GSA schedule contracts.

Finally, Judge Wheeler noted that, although not entirely uniform, prior decisions from the Court of Federal Claims and GAO support his statutory and regulatory interpretation. He cited, among other cases, *Labat-Anderson*,³⁸ and *Severn Cos.*³⁹

Accordingly, Judge Wheeler concluded that the court had jurisdiction to consider protests of orders issued against GSA schedule contracts. He also directly ad-

³⁰ *Id.* (quoting 10 U.S.C. § 2304c(f)) (alteration in original).

³¹ *Id.* (citing 41 U.S.C. § 259(b)(3)).

³² *Id.* (quoting 10 U.S.C. § 2304a(g)).

³³ *Id.*

³⁴ *Id.*

³⁵ FAR § 16.505(a)(9).

³⁶ 74 Fed. Cl. at 136 (quoting FAR 16.500(c)).

³⁷ *Id.* (quoting 61 Fed. Reg. 39,201, 39,202 (July 26, 1996)).

³⁸ 50 Fed. Cl. at 104-05.

³⁹ B-275717, 97-1 C.P.D. ¶ 181 (Apr. 28, 1997).

dressed *Group Seven*, explaining that to the extent *Group Seven* "might be regarded as inconsistent with the holding here," the court found that "*Labat-Anderson* and *Severn* are more in line with the cited provisions of FASA and FAR. . . ."⁴⁰

Analysis: Reaching the Same Result Through Different Paths

At first glance, it appears that four out of five decisions to consider this issue have concluded that the FASA protest bar was never intended to apply to task orders issued against GSA schedule contracts. A review of these cases, however, shows that there is a difference of opinion as to what FASA actually means and, even when cases reached the same result, the decisions followed different reasoning to get there.

As discussed above, GAO was the first to address the FASA protest bar and it relied on the "legislative history" of FASA to find jurisdiction. GAO found that the FASA bid protest bar did not apply to GSA schedule contracts because Congress intended to encourage the use of multiple award contracts, and such an incentive was not needed for schedule contracts, which "already afforded users a choice of multiple contractors."⁴¹ This reasoning, however, appears to be problematic in certain respects. It is questionable whether the level of encouragement necessary for the use of the GSA schedule program provides an adequate basis to conclude that Congress meant to exclude GSA schedule contracts from the protest bar, or that the legislative history cited by GAO clearly reflects an intent to exclude schedule contracts from this protest bar.⁴² In addition, GAO's analysis attempts to discern the intent of Congress without considering the actual text of the FASA provisions.

In *Labat-Anderson*, Judge Wilson considered GAO's opinion in *Severn*, but apparently did not find GAO's interpretation of the legislative history persuasive and concluded that FASA's legislative history "does not shed meaningful light on the scope of the task order protest bar."⁴³

While Judge Wilson did not adopt GAO's view of the legislative history, both GAO in *Severn Cos.* and Judge Wilson in *Labat-Anderson* relied on FAR 16.500(c) to support jurisdiction.⁴⁴ Both also determined that this regulation "supports the interpretation that the restriction was not intended to apply to the FSS since it treats FSS contracts as separate from other indefinite delivery contracts."⁴⁵

The precise text of this provision, however, does not appear to go as far as *Severn* and *Labat-Anderson* suggest. While this FAR provision does suggest that the FAR council intended to treat GSA schedule contracts under FAR Part 8 differently than IDIQ contracts issued under FAR Part 16, the text of this provision only ad-

resses "the authority of the [GSA]" to enter into contracts, and is silent about the right to protest orders placed under such contracts.⁴⁶

The court in *Group Seven* also apparently did not find persuasive this reliance on FAR 16.5. Without elaboration, Judge Bruggink in *Group Seven* explained that "[w]hile we can follow the analysis of *Labat-Anderson*, we find it less than compelling," and emphasized that text of the statute "does not suggest any exceptions."⁴⁷ In fact, the text of the FASA protest bar is quite broad: "[a] protest is not authorized in connection with the issuance of a task order or delivery order. . . ."⁴⁸ Neither *Severn Cos.* nor *Labat-Anderson* directly addressed this statutory language.

In *Idea International*, Judge Wheeler had to reconcile this clear difference of opinion as to the court's jurisdiction in *Labat-Anderson* and *Group Seven*. Although Judge Wheeler in *Idea International* relied on both *Severn Cos.* and *Labat-Anderson* in finding jurisdiction and, in some respects, repeated portions of their potentially incomplete analyses, he engaged in the most detailed analysis of the FASA protest bar yet and relied upon FASA provisions not previously considered.

Most importantly, Judge Wheeler relied on a provision that almost immediately follows the statutory prohibition against protests and provides that "[t]his section applies to task and delivery order contracts entered into under sections 2304a and 2304b of this title."⁴⁹ Judge Wheeler emphasized that GSA schedule contracts are issued pursuant to authority for the GSA program under 41 U.S.C. § 259(b)(3), and not Sections 2304a and 2304b of FASA, and, therefore, found that there was a statutory basis on which to exclude GSA schedule contracts from the protest bar.⁵⁰ This analysis finds support directly from the text of the FASA legislation and directly addresses Judge Bruggink's concern in *Group Seven* that the text of FASA does not suggest any exceptions. In other words, while the express language of FASA's bid protest bar is certainly broad with respect to the bid protest prohibition, Judge Wheeler found that another section of FASA limits the prohibition to Sections 2304a and 2304b contracts.

Judge Wheeler's analysis continued by emphasizing that "[t]he [FSS] program existed long before the passage of FASA in 1994, and the language of Section 2304a(g) confirms that Congress intended for the FSS program to remain separate and distinct from the new FASA authority."⁵¹

Notwithstanding Judge Wheeler's statutory analysis, some might still contend that there is a basis in the legislative history to support extending the statutory bar to task orders under GSA schedule contracts. The conference report accompanying FASA noted that FASA

⁴⁰ 74 Fed. Cl. at 137.

⁴¹ 97-1 C.P.D. ¶ 181 at 3 n.1.

⁴² See H.R. Conf. Rep. No. 103-712 at 178 (1994), reprinted in 1994 U.S.C.A.A.N. 2607, 2608.

⁴³ 50 Fed. Cl. at 105.

⁴⁴ FAR 16.500(c) ("Nothing in this subpart restricts the authority of the [GSA] to enter into schedule, multiple award, or task or delivery order contracts under any other provision of law.")

⁴⁵ *Severn Cos.*, 97-1 C.P.D. ¶ 181 at 3 n.1; see also *Labat-Anderson*, 50 Fed. Cl. at 105.

⁴⁶ FAR 16.500(c) (emphasis added). Similarly, many of these decisions have relied on the savings clause in FASA providing that nothing in FASA limits or expands the "authority" of the GSA to enter into FSS contracts. 10 U.S.C. § 2304a(g). Task order protests, however, do not appear to involve the authority of GSA to enter in schedule contracts so it is not clear that this savings provision was intended to carve out GSA schedule contracts from the bid protest bar.

⁴⁷ 68 Fed. Cl. at 32.

⁴⁸ 10 U.S.C. § 2304c(d).

⁴⁹ 10 U.S.C. § 2304c(f).

⁵⁰ A provision identical to 41 U.S.C. § 259(b)(3) appears at 10 U.S.C. § 2302(2)(C).

⁵¹ 74 Fed. Cl. at 135.

"provide[s] general authorization for the use of task and delivery order contracts to acquire goods and services" and "that this provision is intended as a codification of existing authority to use such contractual vehicles."⁵² This statement could be construed as expressly codifying into FASA the pre-existing authority for GSA to issue multiple award task and delivery order contracts. The conference report continues by providing that "[a]ll otherwise applicable provisions of law would remain applicable to such acquisitions, except to the extent specifically provided in this section."⁵³ By putting these two sentences together, this legislative history could be construed as incorporating pre-existing authority to issue such contracts (i.e., GSA schedule contracts) and providing that such authority remains unchanged except as modified by FASA (i.e., the task order protest bar).

In the end, while Judge Wheeler's opinion in *Idea International* certainly provides an exhaustive analysis of FASA's bid protest bar—and the most persuasive analysis to date—the broad statutory language of that bid protest bar, combined with certain legislative history, may provide some support for the view of *Group Seven* to ultimately prevail. Therefore, given the apparent confusion surrounding Congress's intent with respect to the scope of the FASA protest bar, further legislative clarification of that bid protest bar is warranted.

The Court of Federal Claims' Suggestion For Congressional Action

While the Court of Federal Claims may struggle with its jurisdiction to hear protests of task orders issued against GSA schedule contracts, there does not appear to be any dispute that orders issued against other multiple award IDIQ contracts are not subject to protest at GAO or the Court of Federal Claims. At the same time, the use of such FASA IDIQ contracts has been expanding significantly and large amounts of procurement dollars are now spent through such multiple award contracts with little or no ability to ensure that agencies are spending this money on the basis of meaningful competition. As a result, the Court of Federal Claims has expressed concern that such procurements are insulated from any review by GAO or the courts.

For example, in *A&D Fire Protection Inc. v. United States*,⁵⁴ the court concluded that it did not have jurisdiction to hear a protest of an order issued against a multiple-award IDIQ contract that was not a GSA schedule contract. Nonetheless, Judge Lynn Bush indicated that the court was "troubled . . . that the irregularities in the solicitation of this task order are not subject to protests here, at GAO, or at GSA."⁵⁵ The court explained that "[t]he streamlining of federal procurements allowed by the ban on protests of task order contracts may be abused when the principles of fair competition are subverted."⁵⁶ The court suggested that "perhaps Congress' interest in procurement reform will someday be rekindled by cases which bear the mark of improprieties, but which stand beyond the reach of ju-

dicial review."⁵⁷ As described below, it appears that Congress has a rekindled interest in procurement reform and is reviewing FASA's bid protest bar.

Proposals for Change, Including Pending Legislation

Based on several current proposals for procurement-related reform, the bar against bid protests of task or delivery orders may be significantly scaled back, but none of the pending proposals clarifies whether the remaining statutory bar applies to GSA schedule contracts.

First, the Acquisition Advisory Panel authorized by Section 1423 of the Services Acquisition Reform Act of 2003⁵⁸ recently reviewed federal procurement laws and made recommendations on procurement reform. In its report dated January 2007 and released in July 2007, the Panel specifically recommends rolling back the FASA bar on task and delivery order protests.⁵⁹ The Panel recognized that multiple award IDIQ contracts "provide significant benefits to the government, not the least of which is a reduced administrative cost accruing to those agencies that would otherwise have to conduct full and open competitions for their recurring service needs."⁶⁰

The Panel concluded, however, that "there was never an expectation that these streamlined vehicles would not produce meaningful competition," or that the agencies would not take full advantage of competition before issuing orders against these contracts.⁶¹ Even where procuring agencies have provided competition among contract holders, the Panel indicated that there were concerns about "the level of meaningful competition achieved."⁶²

In further addressing the use of multiple award IDIQ contracts, the Panel's report further explained that "[t]here appear to be several key checks and balances missing that would otherwise contribute to a healthier competitive environment."⁶³ One of those missing checks and balances is the protest remedy, which in the Panel's view "reduce[s] transparency and accountability, including, for instance, the need for clearly stated requirements, evaluation criteria and the incentive to evaluate using reasonable trade offs based on these criteria."⁶⁴

Accordingly, the Panel recommends "limiting the statutory restriction on protests of orders under multiple award contracts to orders valued at \$5 million or less."⁶⁵ The Panel explains that this recommendation arises out of a concern "that the government is purchasing costly and complex services without a commensurate level of deliberation, transparency and review to ensure an appropriate level of discipline. . . ."⁶⁶

Taking their cue from a draft of the Section 1423 Panel's recommendations, Senator Susan Collins (R-ME)

⁵⁷ *Id.* at 141.

⁵⁸ Pub. L. No. 108-136, 117 Stat. 1663, 1669 (2003).

⁵⁹ Report of the Acquisition Advisory Panel To The Office of Federal Procurement Policy And The United States Congress, Executive Summary at 8-11 (Jan. 2007).

⁶⁰ *Id.* at 10.

⁶¹ *Id.* at 10.

⁶² *Id.* at 9.

⁶³ *Id.* at 10.

⁶⁴ *Id.*

⁶⁵ *Id.* at 11.

⁶⁶ *Id.*

⁵² H.R. Conf. Rep. No. 103-712 at 178, reprinted in 1994 U.S.C.A.N. at 2608.

⁵³ *Id.* (emphasis added).

⁵⁴ 72 Fed. Cl. 126 (2006), 86 FCR 201 (Aug. 22, 2006).

⁵⁵ *Id.* at 140.

⁵⁶ *Id.*

and Senator Byron Dorgan (D-ND) have introduced procurement reform bills that would make changes to the awarding and protesting of task orders issued under multiple award contracts. Senator Collins' bill, for example, would require that each individual purchase of goods and services under a multiple award contract in excess of the simplified acquisition threshold (generally \$100,000) be made on a "competitive basis."⁶⁷ This provision would require "fair notice" to all contractors offering goods and services under the multiple award contract and require all contractors responding to have "a fair opportunity to make an offer and have that offer fairly considered."⁶⁸ Although, at first glance, this provision could be considered analogous to FASA's requirement that offerors be afforded a "fair opportunity to be considered" for the award of task or delivery orders, Senator Collins' bill goes further—requiring that offerors are not just "considered," but provided a fair opportunity to be in the game and considered fairly. Senator Dorgan's bill includes a similar requirement, except that the competition requirement would apply only to orders under a multiple award contract in excess of \$1 million.⁶⁹

In addition, both Senators Collins' and Dorgan's bills would amend the FASA bid protest bar, but do not clarify its applicability to GSA schedule contracts. Senator Collins' bill would restrict the bid protest bar to orders valued at less than \$5 million.⁷⁰ Senator Dor-

⁶⁷ Accountability in Government Contracting Act of 2007, S. 680, § 111(a)(1) & (b)(1), 110th Cong. (1st Sess. 2007).

⁶⁸ *Id.*

⁶⁹ Honest Leadership & Accountability in Contracting Act of 2007, S. 606, § 202(b), 110th Cong. (1st Sess. 2007).

⁷⁰ Accountability in Government Contracting Act of 2007, S. 680, § 114.

gan's bill would chip away the protest bar to a more significant extent, limiting the protest bar to orders valued at less than \$500,000.⁷¹ In other words, if enacted, these provisions would permit protests of task or delivery orders issued against multiple award IDIQ contracts above a certain threshold.

Conclusion

Since the mid-1990s and the enactment of the statutory prohibition against protests of task and delivery orders issued against multiple award IDIQ contracts, the use of such multiple award contracts has grown significantly and the federal government has funneled billions of dollars through these contracts. Given the significant role these contracts now play, there appears to be agreement among policymakers that it is time to scale back the statutory prohibition against protests of task and delivery orders, and legislative proposals to do so are already pending in Congress. Unfortunately, while the current legislative proposals would retain the bid protest bar up to a certain dollar threshold, none of the current proposals for change makes any effort to clarify the applicability of this provision to GSA schedule contracts. Given the apparent conflicting decisions and rationales applied in the Court of Federal Claims and GAO in this area, it appears that, if the bid protest bar remains in any form, Congress also should clarify whether the bid protest bar is intended to apply to task or delivery orders issued against GSA schedule contracts.

⁷¹ Honest Leadership & Accountability in Contracting Act of 2007, S. 606, § 202(f).