

WHEN IS A TASK ORDER OUT OF SCOPE?

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Two recent Government Accountability Office (“GAO”) bid protest decisions are interesting because in both cases, the GAO held that a task order issued by the agency was outside the scope of either the underlying Indefinite Delivery, Indefinite Quantity (“IDIQ”) contract, or outside the scope of the task order itself. The cases are: *Western Pilot Service et. al*, B-415732 et. al, March 6, 2018 involving an air tanker procurement by the Department of Interior Bureau of Land Management (“BLM”) and *Alliant Solutions, LLC*, B-415994, May 14, 2018, involving a General Services Administration (“GSA”) Government Wide Acquisition Contract.

When an agency seeks to procure something using an underlying contract or a task order, the product or service sought must be within the scope of the contract or order. If outside the scope, the agency must compete the procurement in accordance with the Competition in Contracting Act or the rules for GSA schedule contracts in FAR Part 8.

In the air tanker procurement, BLM sought proposals from IDIQ contract holders that differed materially from what was in the underlying contract. The following were the significant differences

Single Engine Air Tanker (“SEAT”) Flight Services:

The underlying IDIQ Contracts were awarded to support wildfire suppression operations in the continual U.S., to have aircraft available “on-call” for short periods of time for emergencies or surge requirements. Protesters prepared their IDIQ contract proposals based on the agency’s decades-long practice that it would be conducting separate procurements for the different types of SEAT flight services.

The Task Order Request sought aircraft that would be prepositioned at one location for 75 days or more and reserved exclusively for government use during this period (extended periods of performance at predetermined locations).

Administration of On-Call Contracts/Dispatch

The underlying IDIQ contracts never solicited new pricing for extended, guaranteed periods of performance at predetermine locations. When contractors submitted their proposals for the underlying IDIQ contract, they had no idea that the agency would compete and award the long term guaranteed SEAT flight services that separately were being solicited under another solicitation. The government had for decades procured SEAT flight services under two separate contracts—one for extended guaranteed periods at specific locations and the other for surge or emergency on-call needs.

The GAO sustained the protest, noting that the request for a task order proposal sought services beyond the scope of the underlying multiple award, IDIQ contracts because the protesters could not have reasonably anticipated that BLM would seek to procure air tanker flight services for extended, guaranteed periods at specific locations when the IDIQ contracts were limited to air tanker flight services on an as-needed, on-call basis.

In the case of *Alliant Solutions*, the GSA issued a technical direction letter that assigned Alliant certain new work on an existing task order—thus modifying the scope of the work. Alliant protested that this work could not simply be “assigned” to it by the technical letter, but had to be competed.

The existing task order was for rapid reaction special mission projects related to irregular warfare for the Defense Department and other agencies. The technical letter was issued to assist the government “in establishing operations in a Commercial Cloud Computing Facility.” In evaluating the scope, GAO noted that the original task was to provide research and analysis support for systems assessment (typically, risk management certification and accreditation for the intelligence community). The technical letter required the contractor to educate and develop organic understanding of DOD guidance relating to unclassified data, and develop an understanding of DOD’s cloud first policy. Also, the technical letter required the contractor to provide information technology (“IT”) services to manage the government’s enterprise-wide IT server and storage computing requirements, and to support offices other than the original program office. The GAO concluded that the technical letter’s scope was much broader than the original task order in terms of the offices served and subject matter. The scope of the technical letter was a material departure from the scope of the original task order, and GAO sustained the protest.

The takeaway: Agencies are not permitted to issue modifications to existing contracts, or issue task orders on IDIQ contracts, or issue modifications of existing task orders, that exceed the scope of the original contract, the underlying IDIQ contract or a previously issued task order. If you receive an out of scope modification or technical letter, you should consider protesting this as improper.

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