

## **INDEFINITE QUANTITY CONTRACTS ARE CONTRACTS BUT BLANKET PURCHASE AGREEMENTS ARE NOT**

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In two recent decisions, the Government Accountability Office (“GAO”) and the U.S. Court of Appeals for the Federal Circuit (“CAFC”) have clearly stated that indefinite delivery, indefinite quantity (“IDIQ”) contracts are contracts, but Blanket Purchase Agreements (“BPA”) are not contracts. *JSR, Inc*, B-419110, Nov. 2, 2020 (GAO) and *McLeod Group, LLC v. United States*, Fed. Cir. (No. 1:18-cv-00628-LKG, Dec. 17, 2020.) (CAFC).

*JSR* sought to bid on a construction and design-build IDIQ contract at Dyess Air Force Base, Texas. The Air Force excluded it from the competition because *JSR* had been suspended by the Small Business Administration. *JSR* argued that (1) IDIQ contracts were not traditional government contracts for the purpose of prohibiting debarred or suspended firms from receiving federal contracts; (2) even if IDIQ contracts are subject to suspension and debarment provisions, FA 9.405-1 permits award to suspended contractors; and (3) the solicitation anticipated the award of a contract that lacked binding consideration and therefore was “void as a matter of law.”

The GAO rejected all of *JSR*’s arguments and denied the protest. With respect to “traditional contracts,” FAR 2.101 defines a contract as a mutually binding relationship and includes all kinds of commitments that obligate the government. Part 16 of the FAR specifically identifies indefinite delivery contracts (of which IDIQ contracts are a subset), and the FAR states that an IDIQ contract only obligates the government to issue a minimum quantity of order(s) “to ensure that the contract is binding.” FAR 16.504(a)(1) & (2). GAO found that the FAR does not define a “traditional” contract, nor does the FAR exclude IDIQ contracts from the definition in FAR 2.101. Further, the GAO found no merit to *JSR*’s argument that IDIQ contracts do not impose “material obligations” on the contractor. The FAR requires the government to order and the contractor to furnish at least a stated minimum, which must be more than a nominal quantity. This minimum order guarantee provides adequate consideration under FAR 16.504(a). *JSR*’s protest was denied.

BPA’s are a completely different matter. FAR 13.303 discusses BPAs, and identifies them as “a simplified method of filling anticipated repetitive needs for supplies or services...” FAR 13.303-1(a). The following term was must be included in a BPA:

A statement that the supplier shall furnish supplies or services...if and when requested by the contracting officer. The Government is obligated only to the extent of authorized purchases actually made under the BPA. FAR 13.303-3. The CAFC in *McLeod* considered a claim on a BPA between *McLeod* and the Department of Homeland Security (“DHS”) for management consulting services. After issuing 7 task orders, *McLeod* submitted a certified claim that DHS had failed to issue additional task orders to *McLeod*.

The Court noted that it could only consider a claim under the Tucker Act “upon any express or implied contract with the United States.” 28 U.S.C. Sec 1491(a)(1). A contract with the

government requires (1) mutuality of intent; (2) consideration; (3) an unambiguous offer and acceptance and (4) actual authority on the part of the government representative to bind the government. McLeod argued that the BPA included all the required elements of a binding contract.

First, the Court stated that *Crewzers Fire Crew Tranp. Inc v. United States*, 741 F 3d 1380 (Fed. Cir. 2014) controls the case. The government in that case was not required under the BPA terms to place any orders. The Court noted that the BPA's "reflec[ed] illusory promises that do not impose obligations on either part. Furthermore, the BPA in *McLeod* lacks mutuality of intent. The BPA states that the agreement "is not a contract with the government." Finally, the BPA lacks mutual consideration. The BPA does not obligate any funds and did not place any performance obligation on the government. Rather, such obligations arise only in task orders issued pursuant to the BPA (which task orders would presumably constitute contracts while the BPA does not). The CAFC affirmed the lower court decision and stated it lacked jurisdiction over the claim.

Takeaway. Although IDIQ contracts and BPA may look similar (indefinite quantities, indefinite deliveries), there are significant differences. An IDIQ contract is a contract, subject to a bid protest, and subject to a claim under the Tucker Act. A claim on a BPA is not subject to the Tucker Act because it lacks the key indicia of a contract.

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