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SERVICE CONTRACTING IN THE NEW MILLENNIUM—PART I

By Paul J. Seidman, Robert D. Banfield, Alan L. Chvotkin, and Steve Charles

The Federal Government is the largest purchaser of services,[1] and service contracting is the fastest growing segment of all federal contracting.[2] In Fiscal Year 2001, the Federal Government purchased over $216 billion in goods and services.[3] Of that FY 2001 Government-wide spending, over $109 billion was for services of all kinds,[4] and the Department of Defense acquired over $55 billion of that amount.[5] In FY 2001, services acquisition spending totaled 51% of all federal contracting activity spending.[6]

Most agencies acquire services using many of the same statutory and regulatory policies and procedures used for other types of purchases. In addition, the federal acquisition system provides specific rules for specialized types of services acquisitions, such as architect/engineering or research and development.

This BRIEFING PAPER is the first of two PAPERS focusing on those policies and procedures that are unique to, or principally affect, the Federal Government's acquisition of services. Specifically, this Part I discusses (a) the treatment of services as "*commercial items*" under statutes and FAR Part 12, (b) *performance-based service contracting*, (c) the requirements for analyzing procurement opportunities against the laws and policy guidance on *contract bundling*, and (d) *ordering mechanisms* for services, including orders placed under Federal Supply Schedule contracts and under task order contracts. Part II, to be published later, will address a number of other issues affecting the business relationship between federal agencies and private sector services contractors, including pub-

IN BRIEF

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lic-private competitions under Office of Management and Budget Circular A-76, the basics of the Service Contract Act, and the fundamental elements of termination for convenience and termination for default of service contracts. As the PAPERS note, new laws or revised regulations or administrative policies currently being considered could affect several of these issues.

Commercial Services

■ Legislation

The Federal Acquisition Streamlining Act of 1994 created a statutory preference for the purchase of commercial items[7] and exempted commercial item purchases from various statutory and regulatory requirements.[8] As defined by FASA, a "commercial item" includes certain *support services for commercial items* and certain *stand alone services.*[9]

The Federal Acquisition Reform Act of 1996, also known as the Clinger-Cohen Act, exempted purchases of commercial items from the cost or pricing data submission requirements of the Truth in Negotiations Act[10] and from the Cost Accounting Standards.[11] It also permitted commercial item purchases of $5 million or less to be made under simplified acquisition procedures.[12]

Congress continues to tinker with the coverage of commercial item procurements. The National Defense Authorization Act for FY 1999 required clarifications in the procurement regulations regarding the definition of a "commercial item,"[13] and the FY 2000 Authorization Act clarified what services offered in support of a commercial item qualify as a "commercial item."[14]

■ Services As "Commercial Items"

The definition of a "commercial item" is set forth at FAR 2.101. Pursuant to the legislation, a "commercial item" includes certain *support services for a commercial item* and certain *stand-alone services.*

Support services for a commercial item that may themselves qualify as a commercial item include installation, maintenance, repair, and training. Such services are a commercial item if a contractor offers them contemporaneously to the general public on similar terms.[15]

Stand-alone services are themselves a commercial item if "offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions."[16] However, stand-alone services are not a commercial item if sold "based on hourly rates without an established catalog or market price for the specific service performed."[17]

A "catalog price" is a price included in a catalog, price list, schedule, or other form regularly maintained by a vendor. It must be published or otherwise available to customers. The prices stated are those at which sales are currently, or were last, made to a significant number of buyers constituting the general public.[18]

A "market price" is a current price established at arm's length between buyers and sellers. It must be able to be substantiated through competition or from sources independent of the offeror.[19]

Additional guidance on the stand-alone services definition appears in the DOD *Commercial Item Handbook*. The handbook advises that a stand-alone service for Government-unique requirements

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is commercial as long as there are sufficient "common characteristics" between the commercially available service and the service being acquired.[20] Examples of services listed in the handbook as commercial items are warehousing, garbage collection, and transportation of household goods. More sophisticated services "can" also qualify as a commercial item. Examples of more sophisticated services that "can" qualify are "repair and overhaul work, research-related services, software design, testing, and engineering consultation."[21]

A Contracting Officer has significant discretion in determining whether a service is a commercial item. In protests, the General Accounting Office will not overturn a CO determination unless it is unreasonable.[22] Also, the GAO has refused to rule whether a service is commercial and dismissed the protest where the protester did not demonstrate it was prejudiced by the CO's determination.[23]

■ FAR Part 12

Rules applicable to the purchase of commercial items are set forth in FAR Part 12. Some of the highlights of these rules are set forth below.

There is a preference for the acquisition of commercial items. When purchasing services (or goods) an agency must acquire a commercial item if it meets agency needs. An agency must also require contractors and subcontractors to use commercial components.[24]

Contracts[25] and subcontracts[26] for commercial items are exempt from various statutory requirements, including TINA[27] and the CAS.[28] In addition, the Department of Labor has issued a rule exempting certain contracts for commercial services from the Service Contract Act.[29]

When conducting a procurement for commercial items, a CO must use an offeror's existing product literature instead of requiring a technical proposal. A CO may request a technical proposal only when an offeror's product literature is inadequate.[30]

A CO may elect to use streamlined solicitation and evaluation procedures when contracting for commercial items.[31] Under a pilot program now set to expire January 1, 2003,[32] COs may use simplified acquisition procedures for commercial items up to $5 million.[33]

To the maximum extent practicable, contracts for commercial items may include only clauses that are required by law or determined to be consistent with commercial practice.[34] The Government may not unilaterally order "changes" in the terms and conditions of the contract. Any "changes" must be agreed to by the contractor.[35] When contracting for commercial items, the CO may offer Government financing options that would not otherwise be available.[36]

■ Pros & Cons

The use of simplified acquisition procedures for commercial item procurements up to $5 million under the pilot program is a significant advantage to the Government. On the other hand, in such commercial item procurements, the Government does not have the right to unilaterally order changes in the resulting contract.

In addition, the use of commercial item procedures frees contractors from various statutory and regulatory requirements and permits the Government to use commercial financing procedures. However, the use of simplified acquisition procedures for commercial item contracts up to $5 million makes it easier for COs to steer awards to favored sources.

Performance-Based Contracting

When using the performance-based contracting method, the Government specifies *what* it wants, instead of *how* to do it.[37] When applied to services, this method is commonly referred to as performance-based service contracting. FAR Part 37 requires that performance-based service contracts (1) describe requirements in terms of results rather than performance methods, (2) use measurable performance standards and quality assurance surveillance plans, (3) specify procedures for price reductions when requirements are not met, and (4) include performance incentives where appropriate.[38]

A frequently referenced example of performance-based contracting is the U.S. Army Signal Corps' 1908 award to Wilbur and Orville Wright of a contract for a "heavier-than-air fly-

ing machine."[39] The solicitation set forth the following performance criteria:

> 3. The flying machine must be designed to carry two persons having a combined weight of about 350 pounds, also sufficient fuel for a flight of 125 miles.
>
> 4. The flying machine should be designed to have a speed of at least forty miles per hour in still air, but bidders must submit quotations in their proposals for cost depending upon the speed attained during a trial flight, according to the following scale:
>
> 40 miles per hour, 100 per cent
> 39 miles per hour, 90 per cent
> 38 miles per hour, 80 per cent
> 37 miles per hour, 70 per cent
> 36 miles per hour, 60 per cent
> Less than 35 miles per hour, rejected.
> 41 miles per hour, 110 per cent
> 42 miles per hour, 120 per cent
> 43 miles per hour, 130 per cent
> 44 miles per hour, 140 per cent

This 1908 procurement closely tracks the FAR requirements for performance-based contracting. The solicitation set forth (a) requirements as results instead of how to perform, (b) measurable performance standards, (c) a price reduction if performance criteria are not met, and (d) incentives if performance criteria are exceeded.

A performance work statement (PWS) for goods is commonly referred to as a specification. A PWS for services is commonly referred to as a statement of work (SOW). The use of performance-based contracting has resulted in a new type of PWS called a statement of objectives (SOO). An SOO states what objectives (performance requirements) an agency wants to achieve. In response to an SOO set forth in a solicitation, each offeror develops and includes a SOW in its proposal. The SOW proposed by an offeror is its proposed method of meeting the performance requirements set forth in the SOO. The SOW in the winning proposal is normally incorporated in the contract establishing the contractor's performance obligations. At this point, definitions are in flux while agencies experiment with new approaches. Neither an SOW nor SOO are defined in the FAR. What some refer to as an SOO, others may refer to as a performance-based SOW or performance specification.

Policy Letter 91-2, issued by the Office of Federal Procurement Policy in 1991, makes it Government policy to use performance-based contracting for services to the *maximum extent practicable*.[40] Also, a statutory preference for performance-based contracting when contracting for services is set forth in the National Defense Authorization Act for FY 2001.[41] This policy is implemented in FAR Part 37 and related provisions.[42]

Acquisition plans for service contracts must describe the agency's strategies for implementing performance-based service contracting and provide justification if performance-based service contracting is not used.[43] The CO is responsible for ensuring performance-based service contracting is used to the maximum extent practicable.[44] The order of preference for the contract type for the procurement of services is (1) firm-fixed price performance-based contract or task order, (2) performance-based contract or task order that is not firm-fixed price, and (3) contract or task order that is not performance-based.[45]

All agencies must use performance-based contracting for 20% of service requirements valued at over $25,000 in 2002,[46] and DOD agencies are required to use performance-based contracting for 50% by 2005.[47] Slow agency implementation threatens the achievement of these goals. The most obvious explanations are a reluctance to trust a contractor and the difficulty describing the work to be done in terms of purely performance requirements. Government personnel also opine that their efforts are hampered by disagreements over what qualifies as a performance-based service contract under FAR Part 37 and their need for training.[48]

Some look upon performance-based service contracting as a panacea. Not everyone agrees. One commentator suggests performance-based service contracting is driven by a mentality rooted in contracting for supplies and will never work for services.[49]

Contract Bundling

Contract bundling is the practice of consolidating requirements previously purchased under separate contracts into one large contract. Bundling has been criticized as a barrier to (a) awards to small businesses that performed individual requirements before they were bundled and (b) competitive procurement.

Contract bundling has been a significant procurement policy issue for decades. The use of bundling is limited by (1) the Small Business Act and (2) the Competition in Contracting Act of 1984.[50]

■ Small Business Act Limitations

In the Small Business Reauthorization Act of 1997, Congress added provisions to the Small Business Act to address contract bundling.[51] As amended, the Small Business Act defines a "bundled contract" as one that meets *all* of the following: (a) consolidates two or more procurement requirements that previously were provided or performed under separate, smaller contracts, (b) involves a previous contract that was or could have been performed by a small business, (c) results in a solicitation for a single contract, and (d) is likely to be unsuitable for award to a small business due to a variety of specified factors.[52]

This statutory definition is addressed in the FAR.[53] In addition, the FAR excludes from the definition of "bundling" any contract that will be awarded and performed entirely outside the United States.[54]

The 1997 statutory amendments require that, before proceeding with an acquisition strategy that could lead to a bundled contract, the head of the agency conduct *market research* to determine whether a bundling is "necessary and justified."[55] Bundling may be "necessary and justified" if the Government would derive "measurably substantial benefits."[56] These benefits may include (individually or in any combination or aggregate) cost savings or price reductions, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits.[57] The benefits will be "measurably substantial" if they equal or exceed (1) 10% of the estimated contract value (including options) if the value of the contract is $75 million or less, or (2) 5% of the estimated contract value (including options) or $7.5 million (whichever is greater) if the value exceeds $75 million.[58] Agencies need not conduct market research to determine whether contract bundling is necessary and justified if a cost comparison analysis will be performed under OMB Circular A-76[59] or if the requirement is "critical to the agency's mission success."[60] Additional requirements regarding the identification of specific benefits anticipated to be derived from contract bundling apply if the acquisition strategy involves "substantial bundling" resulting in a contract with an average annual value of $10 million or more.[61]

Where an agency is contemplating awarding a bundled contract, the FAR provides that when performing market research, the acquiring agency's CO should consult with the Small Business Administration's Procurement Center Representative (PCR) or the appropriate SBA Office of Government Contracting Area Office to, among other things, help minimize any adverse impact on incumbent small businesses.[62] If the agency determines that it is appropriate to bundle a contract, the FAR requires the CO to provide a copy of the proposed acquisition package to the SBA PCR and specifies the information that must be included in the notification.[63] At least 30 days before the release of the solicitation for a bundled contract, the agency must notify incumbent small businesses of the intention to bundle the requirement and inform any affected incumbent small business how to contact the appropriate SBA representative.[64]

If the solicitation will result in a bundled contract that offers a significant opportunity for subcontracting, the solicitation must state that small business participation in subcontracting will be a factor in evaluating offers for award.[65] Each offeror's past performance in attaining applicable goals for small business participation under contracts requiring subcontracting plans also will be an evaluation factor.[66]

■ CICA Limitations

CICA (a) mandates "full and open competition"[67] and (b) permits restrictive provisions only to the extent necessary to meet agency needs.[68] CICA does not mention contract bundling. However, bundling runs afoul of CICA if it improperly limits competition. The question in each case is whether such limitation is necessary to meet agency needs.

The GAO sustains protests against bundling when it determines that the bundled procurement is not necessary to meet agency needs.

Neither "administrative convenience"[69] nor the fact that "outstanding competition" was achieved[70] are sufficient justification for bundling. The GAO did not believe the factual basis for an agency justification and sustained a protest where the factual basis was inconsistent with findings in GAO investigative reports.[71] Similarly the bundling of hardware and software maintenance requirements was held to be improper where the agency did not provide a reasonable basis for its determination that the combined requirement was necessary to meet its minimum needs.[72]

On the other hand, the GAO upheld the bundling of requirements for utilities services based on an agency determination that it would not receive competition for all requirements if they were solicited separately.[73] The GAO has also held expectation of technical benefits,[74] standardization and configuration control of parts,[75] and military readiness[76] to be sufficient grounds to justify bundling.

■ Recent Developments

(1) *DOD Guidance*—On January 17, 2002, the Under Secretary of Defense for Acquisition, Logistics and Technology, E.C. Aldridge, issued a memorandum expressing a commitment to provide small business concerns with the "maximum practicable opportunity" to participate in DOD contracting. The memorandum discussed the requirements with which the DOD must comply before awarding a bundled contract.[77] In addition, the DOD Office of Small and Disadvantaged Business Utilization issued a *Benefit Analysis Guidebook* as a reference to assist DOD acquisition strategy teams in performing a benefit analysis before bundling contract requirements.[78] While an extremely valuable reference, the Guidebook is intended to instruct the DOD only, and it only addresses the requirements under the FAR.

(2) *President's Initiative*—On March 19, 2002, in remarks to the Women's Entrepreneurship Summit, President Bush unveiled a multifaceted plan to aid small business.[79] Among the elements of the President's program are initiatives to "save taxpayers dollars by ensuring full and open competition to government contracts" and to "avoid unnecessary contract bundling." As the President noted:[80]

> (t)here are some large hurdles for small business. One is that—and the main one is—that agencies sometimes, many times, only let huge contracts with massive requirements, and they tend to go to the same group of large corporate bidders. The term of art in Washington is called bundling. It effectively excludes small business. And we need to do something about that…And whenever possible, we're going to insist we break down large federal contracts so that small business owners have got a fair shot at federal contracting.

Accordingly, the President instructed the Director of the OMB to review contracting practices at agencies with significant procurement activities to determine whether their contracting practices reflect a strong commitment to full and open competition. The OMB will report the results of the review and consultation to the President within 180 days, along with any recommendations for administration action and proposed legislation. In addition, the President instructed the Director of the OMB to prepare a Government strategy for "unbundling" contracts wherever practicable.[81]

In response to the President's direction, the OMB published in the *Federal Register* a notice of a public meeting on June 14, 2002, and request for comment on these policies by July 1, 2002.[82] As the OMB stated in the notice: "OMB has established two inter-agency working groups to carry out these (review) efforts: one working group will address agency competition practices; the other will develop a strategy for unbundling contracts whenever practicable."[83] The OFPP conducted the public meeting at which a number of private sector organizations addressed their positions on full and open competition and contract bundling.[84] On October 29, 2002, the OMB issued its strategy, which in essence seeks to hold agencies accountable for eliminating unnecessary contract bundling and mitigating necessary contract bundling through recommended regulatory changes and full use of the resources of the SBA's and agencies' small business offices.[85]

(3) *Additional Data Collection*—In 1993, as part of the National Defense Authorization Act for FY 1994, Congress directed the DOD to conduct a comprehensive study on contract bundling and the effect on small business.[86] Since then, there have been numerous other studies to identify the extent of contract bundling and the impact of contract bundling on small business. The SBA's

Office of Advocacy has conducted several studies over the past several years,[87] and the General Accounting Office assessed the extent of contract bundling and the SBA's efforts to oversee contract bundling by federal agencies.[88] In light of the variations in interpretation of statistical information and the difficulties in analyzing "bundling" from the statistical information in the then-existing federal procurement data system, Congress further amended the Small Business Act and included in the Small Business Reauthorization Act of 2000 a provision that requires a change in the federal procurement data system reporting of contract actions and the collection of information on bundling.[89] However, since the data collection requirements have just begun, no statistical reports on bundling using this new data have yet been issued.

(4) *Further Congressional Action*—Congress continues to have an interest in the impact of contract bundling on small business. Just in the second session of the 107th Congress, there have been several additional proposals offered. For example, on May 2, 2002, the House Small Business Committee favorably reported legislation to amend the Small Business Act to require the Administrator of the SBA to submit to the Director of the OMB certain disagreements between the SBA and a procurement agency regarding bundling contracts.[90]

In the Senate, on May 7, 2002, Senators Kerry (D-Mass.), Carnahan (D-Mo.), and Collins (R-Me.) introduced legislation to "prevent federal agencies from circumventing statutory safeguards intended to ensure that separate contracts are consolidated for economic reasons, not administrative expediency."[91] This proposal was referred to the Senate Small Business and Entrepreneurship Committee, of which Senator Kerry is chairman. Separately, Senator Collins introduced legislation that would require only the DOD to prove the cost benefit of consolidating a contract in excess of $5 million.[92] This proposal was referred to the Senate Armed Services Committee.

Ordering Mechanisms

To keep pace with the dramatic increase in Government purchases of services, agencies are using innovative ordering mechanisms. The driving force behind the development and expanded use of these mechanisms was FASA.

In particular, since the enactment of FASA, there has been a dramatic increase in services available under Federal Supply Schedules administered by the General Services Administration. This resulted, in part, from FASA's expanding the definition of "commercial items" to include certain services (discussed above) and the outreach efforts made by the GSA to meet customer agency demands. In addition, FASA added new requirements for the award and use of task order contracts. These requirements were implemented in FAR Subpart 16.5. The new rules for task order contracts apply to procurement by an agency solely for its own use and to multiple agency ordering mechanisms such as *Government-wide acquisition contracts (GWACs)* and *multi-agency contracts (MACs).*

■ FSS Contracts

The GSA was given authority to award and administer FSS contracts by the Federal Property and Administrative Services Act of 1949.[93] FSS contracts are used to obtain "commonly used [commercial] supplies and services."[94] The FAR generally requires agencies to use the FSS if the services being procured are available under the Schedules.[95] The FSS program is implemented in FAR Subpart 8.4 and Part 38 and the resulting FSS contracts. FSS contracts are separate and distinct from the indefinite-delivery contracts described at FAR Subpart 16.5 (discussed below).

Ordering procedures for FSS contracts are set forth in FAR 8.404. When these procedures are followed, the order is considered to be issued using full and open competition.[96] The ordering agency is not required to seek further competition, synopsize the requirement, or make a separate determination of fair and reasonable pricing.[97]

The FSS were created to provide a simplified process for agencies to obtain volume discounts when acquiring commonly used supplies and services. Before FASA, the FSS did not include services other than those typically provided by a commercial company in direct support of its products, such as installation, training, and maintenance.

The increased use of FSS to purchase services resulted from FASA broadening the definition of "commercial items" to include certain stand-alone services, i.e., services other than those in direct support of the sale of a commercial product.[98] After the enactment of FASA, the GSA expanded its schedules to include professional services (excluding those services covered by the Service Contract Act and Davis-Bacon Act). Awards of services on schedule are based on rates charged for services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions.[99]

The use of the FSS to purchase services by the hour poses a problem. As previously discussed, the FASA definition of a "commercial item" excludes stand-alone services if sold based on hourly rates without an established catalog or market price for the specific service performed.[100] Debate continues on whether hourly services performed under schedules based on hourly rates without an established catalog or market price for a specific service performed are permissible under the FASA definition of a "commercial item."[101]

Competition requirements under § 803 of the FY 2002 National Defense Authorization Act applicable to the DOD's procurement of services under the FSS and ordering procedures limited to the FSS are discussed below.

(a) *Section 803 Competition Requirements*—Section 803 of the FY 2002 National Defense Authorization Act requires that all DOD purchases of services over $100,000 under multiple award contracts be made on a "competitive basis."[102] The types of multiple award contracts to which this requirement applies includes the FSS and, as discussed in more detail later, multiple award task order contracts under FAR Subpart 16.5.[103] DOD purchases that do not exceed the $100,000 threshold and all purchases by other agencies are not subject to these additional competition requirements. For at least for the time being, there are added requirements for DOD service procurements that do not exist for civilian agency procurements. The DOD recently issued a final rule amending the Defense FAR Supplement to implement § 803.[104]

For a DOD purchase of services to be made on a "competitive basis," the CO must (1) provide a fair notice of the intent to make the purchase to all contractors under the multiple award contract offering the services and (2) afford all contractors responding to the notice a fair opportunity to submit an offer and have it considered.[105] For awards to be made exclusively through the GSA Schedules, notice may be provided to fewer than all awardees if (a) at least three offers are received or (b) the CO makes a written determination that no other qualified offerors could be reasonably identified.[106]

(b) *Ordering Procedures Limited to the FSS*—GSA procedures for placing orders under the FSS are not set forth in regulation. Instead they appear in the "terms and conditions" section of the pertinent GSA FSS pricelist. Typical provisions are set forth in the current Group 70 GSA FSS contract pricelist for services under Special Item Number 132-51 and 132–52. It provides the following ordering procedures:[107]

> FAR 8.402 contemplates that GSA may occasionally find it necessary to establish special ordering procedures for individual Federal Supply Schedules or for some Special Item Numbers (SINs) within a schedule. GSA has established special ordering procedures for services that require a Statement of Work. These special ordering procedures take precedence over the procedures in FAR 8.404 (b)(2) through (b)(3).
>
> GSA has determined that the prices for services contained in the contractor's price list applicable to this Schedule are fair and reasonable. However, the ordering office using this contract is responsible for considering the level of effort and mix of labor proposed to perform a specific task being ordered and for making a determination that the total firm-fixed price or ceiling price is fair and reasonable.
>
> [In support of determining that total firm-fixed price or ceiling price is fair and reasonable, the following ordering procedures are established:]
>
> (a) When ordering services, ordering offices shall—
>
> (1) Prepare a Request (Request for Quote or other communication tool):
>
> (i) A statement of work (a performance-based statement of work is preferred) that outlines, at a minimum, the work to be performed, location of work, period of performance, deliverable schedule, applicable standards, acceptance criteria, and any special requirements (i.e., security clearances, travel, special knowledge, etc.) should be prepared.
>
> (ii) The request should include the statement of work and request the contractors to submit

either a firm-fixed price or a ceiling price to provide the services outlined in the statement of work. A firm-fixed price order shall be requested, unless the ordering office makes a determination that it is not possible at the time of placing the order to estimate accurately the extent or duration of the work or to anticipate cost with any reasonable degree of confidence. When such a determination is made, a labor hour or time-and-materials proposal may be requested. The firm-fixed price shall be based on the rates in the schedule contract and shall consider the mix of labor categories and level of effort required to perform the services described in the statement of work. The firm-fixed price of the order should also include any travel costs or other incidental costs related to performance of the services ordered, unless the order provides for reimbursement of travel costs at the rates provided in the Federal Travel or Joint Travel Regulations. A ceiling price must be established for labor-hour and time-and-materials orders.

(iii) The request may ask the contractors, if necessary or appropriate, to submit a project plan for performing the task, and information on the contractor's experience and/or past performance performing similar tasks.

(iv) The request shall notify the contractors what basis will be used for selecting the contractor to receive the order. The notice shall include the basis for determining whether the contractors are technically qualified and provide an explanation regarding the intended use of any experience and/or past performance information in determining technical qualification of responses. If consideration will be limited to schedule contractors who are small business concerns as permitted by paragraph (2) (i) below, the request shall notify the contractors that will be the case.

(2) Transmit the Request to Contractors:

(i) Based upon an initial evaluation of catalogs and price lists, the ordering office should identify the contractors that appear to offer the best value (considering the scope of services offered, pricing and other factors such as contractors' locations, as appropriate). When buying IT professional services under SIN 132-51 ONLY, the ordering office, at its discretion, may limit consideration to those schedule contractors that are small business concerns. This limitation is not applicable when buying supplies and/or services under other SINs as well as SIN 132-51. The limitation may only be used when at least three (3) small businesses that appear to offer services that will meet the agency's needs are available, if the order is estimated to exceed the micro-purchase threshold.

(ii) The request should be provided to three (3) contractors if the proposed order is estimated to exceed the micro-purchase threshold, but not exceed the maximum order threshold. For proposed orders exceeding the maximum order threshold, the request should be provided to additional contractors that offer services that will meet the agency's needs. Ordering offices should strive to minimize the contractors' costs associated with responding to requests for quotes for specific orders. Requests should be tailored to the minimum level necessary for adequate evaluation and selection for order placement. Oral presentations should be considered, when possible.

(3) Evaluate Responses and Select the Contractor to Receive the Order:

After responses have been evaluated against the factors identified in the request, the order should be placed with the schedule contractor that represents the best value. (See FAR 8.404).

■ Task Order Contracts

A task order contract is a contract for services (other than an FSS contract) that does not specify a firm quantity. Orders for tasks are placed during the contract period.[108] A task order contract can be awarded to a single contractor or multiple awards can be made. Task order contracts are governed by FAR Subpart 16.5 and should not to be confused with FSS contracts, which are governed by FAR Parts 8 and 38.

Task order contracts existed before the enactment of FASA. Some were multiple awards permitting task orders for the same services to be issued to two or more contractors. However, the FAR did not define a task order contract and provided little guidance. The FASA provisions on task order contracting resulted from concerns that agencies used overly broad statements of work and issued task orders on a sole-source basis to circumvent competition requirements. In an attempt to curtail these abuses, FASA (1) established minimum requirements for task order contracts, (2) created a preference for multiple awards, (3) limited the circumstances for protesting individual task orders under such contracts, and (4) provided special treatment for advisory and assistance services. [109]

The FAR Council implemented the FASA provisions for task order contracts exclusively under FAR Subpart 16.5 for *indefinite-delivery* contracts. A "task order contract" is defined as "a contract for services that does not procure or specify *a* firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract."[110]

There are two different types of task order contracts: (a) requirements contracts and (b) indefinite-delivery, indefinite-quantity (IDIQ) contracts. [111]

(The third type of indefinite delivery contract identified under FAR Subpart 16.5, a *definite quantity* contract, does not qualify as a task order contract since it sets forth a *firm* quantity.)

A *requirements contract* requires (1) the contractor to fill all the Government's purchase requirements for the services designated in the contract over a fixed period, and (2) the Government to purchase those needs by placing orders with no one other than the contractor.[112] Even though the Government does not guarantee any actual requirements will materialize (i.e., no stated minimum required), adequate consideration to bind the contractor is present based on the Government's promise to satisfy all its purchase requirements (if any) exclusively from the contractor.[113]

The CO must provide a realistic estimate of the Government's requirements.[114] The estimate must be based on records of previous requirements and consumption or obtained by other means using the most current information available.[115] The Government may be held liable for failing to base its estimates on the best available information.[116] If feasible, the CO "shall" set forth the Government's maximum requirements and "may" establish a minimum and maximum amount for any single order under a requirements contract.[117]

A requirements contract may be appropriate for acquiring services when the Government *anticipates* recurring requirements but cannot predetermine the precise quantities it will need over the contract period.[118]

An *IDIQ contract* for services provides for an indefinite quantity of services within stated *maximum* and *minimum* limits with performance to be scheduled by placing orders with the contractor.[119] For the contract to be binding, the *minimum* amount must be more than a *nominal quantity*. At the same time, the minimum should not exceed the amount the Government is fairly certain to need.[120]

If the Government fails to order the minimum amount, it breaches the contract.[121] The measure of damages is the *difference* between the contract price of the unordered minimum guaranteed quantity and the additional cost the contractor would have incurred doing the work.[122] However, the Government can avoid a breach if it terminates for convenience before expiration of the contract period.[123] In that case, the contractor's recovery would be determined under the "Termination for Convenience" clause of the contract.[124]

An IDIQ contract may be used when the Government cannot predetermine its needs *above a specified minimum,* and it is inadvisable to commit to more than a minimum quantity.[125]

The solicitation for a task order contract (whether single or multiple award) must include (a) the period of the contract, including options and any extensions, (b) the maximum quantity or dollar value of the services to be procured, and (c) a statement of work or specifications.[126] Individual task orders issued under a single award task order contract do not have to be competed or synopsized.[127] A contractor cannot protest a task order except on grounds that it is *beyond the scope*, *period* or *maximum value* of the contract as solicited.[128]

■ Multiple Award Task Order Contracts

FASA established a preference for multiple awards of task order contracts.[129] As long as the solicitation provides notice that multiple awards may be made, an agency may award task order contracts for the same or similar services to two or more contractors.[130] The CO must make multiple awards of task order contracts to the "maximum extent practicable."[131]

(1) *FAR Subpart 16.5*—The FAR provisions differ for requirements and IDIQ contacts.[132] An unresolved issue is whether the FAR permits multiple awards of *requirements contracts.* This uncertainty results from the interrelationship of the following provisions: (a) the FASA preference for the multiple award of task order contracts, (b) FAR 16.503, which sets forth sets forth no guidance for, but does not prohibit, the multiple award of requirements contracts, and (c) FAR 16.102(b), which states, "Contract types not described in this regulation shall not be used, except as a deviation under Subpart 1.4."

There have been multiple awards of GSA FSS requirements contracts. For example, the Federal Circuit held that a requirements-type contract un-

der a GSA multiple award schedule was enforceable even though the contract did not guarantee work to any *individual* contractor.[133] As a result, the Government breached the contract when it ordered services from other than one of the 10 contractors on the Schedule. While the case is based on a GSA FSS contract, its rationale would appear to apply to requirements contracts issued under the FAR Subpart 16.5 provisions for task order contracts. A leading commentator suggests that, due to the uncertainty surrounding a multiple award requirements contracts, a CO should seek a FAR deviation before using this method.[134]

A CO must make multiple awards of an IDIQ—and perhaps a requirements contract— unless (1) only one contractor can meet the Government's needs because the services are unique or highly specialized, (2) it is determined that the Government will get favorable terms and conditions, including pricing, if a single award is made, (3) the expected administration cost of making multiple contracts will exceed the expected benefits of making multiple awards, (4) the projected task orders are so integrally related that only a single contractor can reasonably perform the work, (5) the total estimated value of the contract is less than the simplified acquisition threshold, or (6) multiple awards would not otherwise be in the best interests of the Government.[135]

Orders issued under a multiple award contract are not subject to protest except on the grounds the order increases the *scope*, *period* or *maximum value* of the contract, just like orders issued under a single award task order contract.[136]

The contracting agency must give *all contractors* that received an award "a fair opportunity to be considered" for each order over $2,500.[137] For DOD purchases, additional requirements for task orders over $100,000 may be imposed by § 803 of the FY 2002 National Defense Authorization Act. The factors to be considered and selection criteria that will be used to provide multiple awardees a fair opportunity to be considered for each order must be set forth in the original solicitation and contract.[138] Such factors should include past performance and cost.[139]

A CO is not required to provide awardees a fair opportunity to be considered where a determination is made that (a) the agency's need for the services is so urgent that providing other awardees a fair opportunity would result in unacceptable delays, (b) the services are unique or highly specialized and only one contractor is capable of meeting the agency's needs, (c) the order should be issued on a sole-source basis in the interest of economy and efficiency because the order is a logical follow-on to previous order issued on a competitive basis, or (d) it is necessary to place the order with a particular contractor to satisfy a minimum guarantee.[140]

Contractors that believe they are not given a fair opportunity to be considered for an order generally cannot protest. The only means of challenging the award of a task order is to file a complaint with the agency's designated "task and delivery order ombudsman."[141] Agencies must designate a senior agency official who is independent of the CO to serve as the ombudsman.[142] One exception to the prohibition on filing a protest is the failure of the agency to identify the best value to the Government at the lowest cost when that best value is readily available under another FSS.[143] It is unclear whether § 803 of the FY 2002 Authorization Act creates a new basis for protest for failure to provide a fair opportunity to be considered for award. However, even through a contractor may be without a protest remedy to challenge a task order award, it may be able to recover damages for a Government failure to "fairly consider" it for the award of a task order.[144]

(2) *Section 803 Competition Requirements*—As discussed earlier, § 803 of the FY 2002 National Defense Authorization Act, requires that all DOD purchases of services over $100,000 under multiple award contracts, including multiple award task order contracts, be made on a *competitive basis.*[145] This requirement does not apply to (a) non-DOD-funded awards, (b) if an order is made under a FASA exception to the "fair opportunity to be considered" requirement, or (d) where a statute requires performance by a specified source.[146] Multiple agency task order contracts, which are discussed below, are also subject to the competitive basis requirement for purchases of services under multiple award contracts exceeding $100,000 unless an exception

applies.[147] The DOD recently amended the DFARS to implement the § 803 competition requirement.[148]

■ Task Order Contracts For Advisory & Assistance Services

Task order contracts for advisory and assistance services are provided special treatment under FASA and the implementing FAR regulations. A possible explanation for the special treatment is the close working relationship required between contractor and Government personnel under such contracts. "Advisory and assistance services" are defined as services provided to support or improve Governmental organizational policy development, decisionmaking, management and administration, and research and development activities.[149] Such services include providing studies, analyses, and evaluations. Systems engineering and technical direction essential to the direct support of a weapon system are also advisory and assistance services.[150]

Task order contracts for advisory and assistance services cannot exceed 5 years including all options and extensions unless otherwise provided by law.[151] A one time, six-month extension is permitted where (1) the award of the follow-on contract has been delayed due to reasons not reasonably foreseeable at the time of award and (2) the extension is necessary to ensure continuity of services.[152] FASA requires that any task order contract for advisory and assistance services that exceeds *three years* and *$10 million* must be for multiple awards unless it is determined that the services are so unique or highly specialized that it is not practicable to make multiple awards.[153]

The FAR prohibits awards of *requirements contracts* for advisory and assistance services in excess of 3 years and $10 million except where either (a) the services are so unique that it is impracticable to make a multiple award of an IDIQ contract, or (b) the advisory and assistance services are not a significant portion of the contract.[154] The FAR requires multiple awards of *IDIQ contracts* for advisory and assistance services in excess of 3 years and $10 million absent specified circumstances.[155] As previously discussed, it is unclear whether there can be multiple awards of a requirements contract.

■ Multiple Agency Task Order Contracts

The FAR was recently amended to expressly provide for multiple agency task and delivery order contracting in accordance with § 804 of the National Defense Authorization Act for FY 2000.[156] The FAR 2.101 "Definitions" provisions now define the terms *Government-wide acquisition contract* and *multi-agency contract.*

(1) *Government-Wide Acquisition Contract*—A "Government-wide acquisition contract" (GWAC), formerly called a Government-wide agency[157] contract, is a task or delivery order contract for information technology established by one agency for Government-wide use.[158] A GWAC is operated by an executive agent designated by the OMB pursuant to § 5112(e) of the Clinger-Cohen Act, 40 U.S.C. § 1412(e), or under a delegation of procurement authority issued by the GSA prior to August 7, 1996, under authority granted the GSA by the repealed Brooks Act, 40 U.S.C. § 759.[159]

Since a GWAC is a task or delivery order contract it must satisfy the standards under FASA and FAR Subpart 16.5 as discussed above. As discussed below, the Economy Act does not apply to orders under GWACs, unlike a multi-agency contract.

GWACs currently operate at the Departments of Commerce and Transportation, the National Aeronautics and Space Administration, GSA's Federal Technology Service, and the National Institutes of Health. However, the Department of Transportation has announced its intent to terminate its GWACs status. [160]

(2) *Multi-Agency Contract*—Under the FAR definition, a "multi-agency contract" (MAC) is a task or delivery order contract established by one agency for use by the establishing agency and may be used by other Government agencies to obtain supplies and services, consistent with the Economy Act.[161] A MAC can be for information technology established pursuant to § 5124(a)(2) of the Clinger-Cohen Act, 40 U.S.C. § 1424(a)(2), or for other services.[162]

The Economy Act, 31 U.S.C § 1535, authorizes interagency acquisition of services (or goods). The Act is implemented under FAR Subpart 17.5. Under these provisions, the *requesting agency* obtains services from or through a *servicing agency,* in essence issuing a task order against the servicing agency's contract.[163] Each order must be supported by a *Determination and Finding* (D&F) stating that (a) use of an interagency acquisition is in the best interests of the Government and (b) the services (or supplies) cannot be obtained as "conveniently or economically" by contracting directly with a private source.[164] If the servicing agency must take contracting action to satisfy the order, the D&F should also include a statement that either (1) the acquisition will be made under an existing contract of the servicing agency for the same or similar services, (2) the servicing agency has capabilities or expertise to satisfy the requirement that is not available within the requesting agency, or (3) the servicing agency is specifically authorized by law or regulation to procure the services for other agencies.[165]

Procurement under a MAC must be consistent with the criteria applicable to an Economy Act procurement under FAR Part 17.5. In addition, a MAC is a task and delivery order contract that must also satisfy FASA and FAR Subpart 16.5.

GUIDELINES

These *Guidelines* are intended to assist you in understanding the Federal Government's acquisition of services. They are not, however, a substitute for professional representation in any specific situation.

1. Avoid statutory and regulatory requirements, including TINA cost or pricing data submission requirements and compliance with the CAS, by urging COs to purchase services using *FAR Part 12 commercial item procedures.* Bear in mind that both *support services* for commercial items and *standalone services* can qualify as commercial items.

2. Remember that there is a statutory preference for the Government's use of *performance-based service contracting.* When using performance-based contracting, the Government specifies *what* it wants instead of *how* to do it.

3. Recognize that *contract bundling* limits small business participation and competition. Bundling is limited by the *Small Business Act* and *CICA*. To justify bundling, agencies must conduct *market research*. The GAO will sustain a *protest* against bundling if it determines that the bundled procurement is *not necessary to meet agency needs.*

4. Keep in mind that in general Government purchases of *commercial services* under the *FSS* following the ordering procedures set forth in FAR Subpart 8.4 or in the GSA Schedule are considered to be issued using *full and open competition.* However, *DOD purchases* of services *over $100,000* under the FSS are subject to the FY 2002 National Defense Authorization Act § 803 requirement that such purchases under multiple award contracts be made on a "*competitive basis.*"

5. Understand that a *task order contract* is a contract for services, other than an FSS contract, that does *not* specify a *firm quantity. IDIQ* and *requirements contracts* are types of task order contracts. There is a statutory *preference* for *multiple award* task order contracts.

6. Note that it is unclear whether the FAR permits multiple awards of *requirements contracts.*

7. Be aware that orders issued under either a single or multiple award task order contract are generally *not* subject to *protest* except on the grounds the order increases the *scope, period,* or *maximum value* of the contract.

8. Remember that unless an exception applies, the contracting agency must give *all contractors* that received an award under a multiple award task order contract a "*fair opportunity to be considered*" for *each order over $2,500.*

9. Keep in mind that unless an exception applies, the FY 2002 National Defense Authorization Act § 803 requirement that *DOD purchases* of services *over $100,000* under *multiple award contracts* be made on a "*competitive basis*" applies to *multiple award task order contracts*, as well as to *FSS contracts.*

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4/ Id.

5/ Id. fig. 5, at 27.

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7/ Pub. L. No. 103-355 §§ 8104 (DOD), 8203 (civilian agencies), 108 Stat. 3243 (1994) (codified at 10 U.S.C. § 2377 (DOD); 41 U.S.C. § 264b (civilian agencies)).

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36/ FAR 12.210.

37/ FAR 2.101.

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STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

(Act of Aug. 12, 1970; Sec. 3685, Title 39, U.S. Code)

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I certify that the statements made by me above are correct and complete.

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