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Do Words Matter? GAO Says Yes In Bid Protest Decision

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Law360, New York (November 19, 2015, 10:13 AM ET) -- Do words matter? In a precedent-setting decision in Harris IT Services Corp., B-411699, B-411796, the Government Accountability Office said, "Yes." In particular, the GAO made clear that the phrase "delivery order" has a particular meaning under the law and that government agencies must abide by that definition when procuring goods and services.

By way of background, in 2014, the FBI sought to award a Motorola Solutions Inc. brand name indefinite-delivery, indefinite-quantity contract for subscriber (handheld and dashboard) and infrastructure (e.g., servers, dispatch consoles) radio equipment. The FBI was forced to cancel that procurement in the face of multiple protests, admitting to the GAO that it could not defend the justification and approval used to support the request for proposal's brand name restrictions.

One year later, the FBI once again sought to procure Motorola brand name radio equipment by soliciting proposals for "delivery order contracts" under the U.S.Department of Homeland Security's pre-existing Tactical Communications ("TacCom") IDIQ contract. TacCom comprises five different IDIQ contract categories, known as technical categories. Technical Category 1 ("TC1") covers subscriber radio equipment; TC2 covers infrastructure equipment. Pursuant to the terms of the TacCom IDIQ, ordering agencies are required to provide each awardee within a particular technical category a "fair opportunity" to compete for every delivery order.

The FBI issued requests for proposals under both TC1 and TC2 that required offerors to propose Motorola brand name features. Each RFP explained that the FBI intended to award a single "delivery order contract" to a single awardee, with an undefined number of "delivery orders" to be issued to the awardee at future, as yet undetermined dates. Quantities, place of delivery and other details relating to any particular "delivery order" would be provided at the time such orders were placed. Only Motorola submitted a bid in response to either RFP.

Harris protested the terms of both RFPs, arguing among other things that they constituted nothing more than an improper attempt by the FBI to shoehorn its failed RFP from the year before into TacCom, and that the FBI actually sought to award what Harris described as "second-tier IDIQ" contracts rather than delivery orders. Harris asserted that the FBI's new procurement scheme violated both TacCom and the Federal Acquisition Regulation. In particular, Harris argued that TacCom limited ordering agencies to awarding "delivery orders," a defined term under the FAR, while the RFPs at issue clearly contemplated the award of "delivery order contracts," a separately defined term under the FAR. Harris also pointed out that even if the RFPs could be viewed as delivery orders, the RFPs improperly increased the scope of the IDIQ contract. The RFPs exceeded the ordering period and performance period of TacCom and did not identify a maximum quantity, as required.

In response, the FBI argued that because it sought to procure equipment through a pre-existing IDIQ contract, it necessarily sought to award "delivery orders." As to Harris' argument that an IDIQ instrument by any other name remains an IDIQ instrument regardless of what an agency calls it, the FBI argued that it had considerable discretion under the FAR to shape its ordering procedures as it saw fit. The FBI further argued that it did not matter that its RFPs contemplated the placing and performance of delivery orders after the time period authorized by the TacCom IDIQ contract. The FBI argued that because the RFPs incorporated the terms of the underlying TacCom contract, the terms of TacCom controlled. Put simply, the FBI contended that the RFPs could not increase the scope of TacCom because TacCom's terms superseded the terms of the RFPs. In doing so, the FBI ignored the provision in the FAR that expressly authorizes the filing of bid protests against proposed "delivery orders." In a lengthy decision, the GAO sustained each of Harris' protest grounds, but devoted most of its attention on the distinction between "delivery orders" and the IDIQ-type instruments under which they issue.[1]

The GAO adopted Harris' argument and made clear that the RFPs envisioned awarding second-tier IDIQ type instruments. The GAO then addressed whether an agency's considerable discretion in shaping procurements allowed it characterize such instruments as "delivery orders" to be awarded under a pre-existing IDIQ contract. The GAO detailed the legislative history that gave rise to IDIQ contracts and examined the statutory definitions for "delivery orders" as distinguished from "delivery order contracts."

As the GAO explained, a delivery order, unlike a delivery order contract, must "clearly describe all ... supplies to be delivered so the full cost or price for the performance of the work can be established when the order is placed." FAR 16.505(a)(2).[2] A delivery order contract or IDIQ, on the other hand, is a contract for property that: does not procure or specify a firm quantity of property (other than a minimum or maximum quantity); and provides for the issuance of orders for the delivery of property during the period of the contract. 41 U.S.C. § 4101(1). In short, delivery orders are placed under delivery order contracts for specific quantities.

Given the above, the GAO held that the FBI's RFPs improperly sought to award second-tier IDIQ instruments under TacCom. While acknowledging that the FAR gives agencies considerable discretion as to how they may procure goods and services, it emphasized that nothing in the FAR "provides agencies with the discretion to use a contract vehicle or instrument different from a 'delivery order' as that term is defined under the FAR."

The GAO also sustained the protest on the basis that the RFPs impermissibly increased the period and scope of the TacCom IDIQ contract. The GAO rejected the FBI's contention that the RFPs' delivery schedules would not, in practice, exceed TacCom's schedule because the terms of TacCom superseded the RFPs. Instead, the GAO found dispositive the fact that the RFPs expressly provided for a period of performance longer than the period of performance in TacCom. Moreover, the lack of maximum quantities in the RFPs permitted the FBI to place orders without any constraint on total dollar value, including an amount beyond the total value of the TacCom contract. The GAO concluded that the FBI's RFPs reflected impermissible increases in the scope of the underlying TacCom contract.

Harris IT Services Corp. serves as a clear lesson that words have meaning. While agencies have great latitude in structuring their procurements, they are not free to disregard the definitions set forth in the FAR. While the GAO's decision focused on the meaning of two specific phrases — "delivery order" and "delivery order contract" — the principle applies far more broadly. What does this mean for contractors doing business with the federal government and for the lawyers who represent them?

First, read RFPs carefully and thoroughly as soon as possible after issuance to ensure that you have time to file a protective protest before proposals are due. Any concerns that relate to the terms of the solicitation must be filed before proposals are due or they will be deemed untimely. Both the GAO and the Court of Federal Claims (which also has jurisdiction over bid protests) will dismiss untimely protests. The protests at issue in the Harris IT Services case were both pre-award protests filed before proposals were due. Indeed, it is a good idea to monitor the government's official procurement website, FedBizOpps at www.fbo.gov, to stay abreast of upcoming procurements as the government may provide draft RFPs in advance of official releases, and provide interested contractors with an opportunity to ask clarifying questions.

In reading the RFP, keep an eye out for ambiguous terms susceptible to multiple meanings. If a term is "patently ambiguous" — i.e., readily susceptible to more than one interpretation, contractors must protest the ambiguity before proposals are due. Otherwise, the protest will be deemed untimely. Similarly, terms that restrict competition, such as requirements that unnecessarily or unjustifiably limit the procurement to brand name or proprietary features unique to one manufacturer despite the existence of equivalent nonproprietary products, must be protested prior to the date proposals are due.

As noted above, the Harris IT Services case involved RFPs for delivery orders under a pre-existing umbrella IDIQ contract. Procuring agencies seeking to place delivery orders are supposed to afford all awardees under the IDIQ contract a "fair opportunity" to compete. Although the rules regarding fair opportunity (found in FAR Part 16) are slightly different than the rules regarding full and open competition (which are covered under FAR Part 6), both invoke the overarching principle of competition as the norm. Thus, an agency seeking to exempt a delivery order RFP from the fair opportunity rules must justify doing so in writing. Protests involving a failure to justify exemptions from the fair opportunity rules must also be filed before proposals are due.

Sometimes, the terms of a delivery order RFP seem clear and "fair" on their face, but only when the RFP is read as a stand-alone document. Because delivery orders are placed under a pre-existing IDIQ contract, whose terms and conditions control, it is important to have the terms of that IDIQ contract in mind when reviewing the delivery order RFP. As happened in the Harris IT Services case, sometimes delivery order RFPs run afoul of the master IDIQ contract, either by seeking to place orders beyond the permitted ordering period, allowing performance to extend beyond the contractual term, or by inappropriately expanding the type of work to be performed. Each of these examples constitutes the awarding of contracts without competition, and each present a valid ground of protest. Contractors must carefully review the issuance or proposed issuance of orders, in conjunction with the master IDIQ contract, to ensure that the order does not bypass competition in one of the ways described here.

In sum, while the law states that agencies must abide by the definitions set forth in the FAR, it is not self-enforcing. It is incumbent on contractors to keep a watchful eye on the manner in which agencies seek to procure goods and services if they want to ensure they have a fair opportunity to compete.

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DISCLOSURE: The authors, along with Lee Curtis and William Bainbridge, represented Harris IT Services Corp in the protests discussed in this article.

[1] The GAO also sustained the protest on the ground that the RFP included unjustified restrictive specifications.

[2] Delivery orders procure supplies while task orders procure services. Although this article focuses on delivery orders, the rules discussed here apply with equal force to task orders.