Do Words Matter? GAO Decides “Yes” in Delivery Order Precedent Case

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Do words matter? In a precedent-setting decision in Harris IT Services Corp., B-411699, B-411796, GAO said “yes.”[1] In particular, 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 brand name IDIQ 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 GAO that it could not defend the Justification and Approval used to support the Requests for Proposal’s (RFP) 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 RFPs 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’ Protest Argument

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 Regulations (FAR). 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.

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. In a lengthy decision, GAO sustained each of Harris’ protest grounds but devoted most of its attention to the distinction between “delivery orders” and the IDIQ-type instruments under which they issue.[2]

GAO’s Decision

GAO adopted Harris’ argument and made clear that the RFPs envisioned awarding second-tier IDIQ type instruments. GAO then addressed whether an agency’s considerable discretion in shaping procurements allowed it to characterize such instruments as “delivery orders” to be awarded under a pre-existing IDIQ contract. 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 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). 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, 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.” Simply put, while agencies enjoy a great deal of latitude in how they procure goods and services, they do not have the power to ignore the plain meaning of the law.

Endnotes
Article co-author Andrew E. Shipley is a partner in the Government Contracts practice at Perkins Coie, LLP. Article co-author Seth Locke is Counsel with Perkins Coie's Government Contracts practice. Shipley and Locke, along with Lee Curtis and William Bainbridge, formed the legal team that represented Harris IT Services Corp in the protests discussed in this article.

GAO also sustained the protest on the ground that the RFP included unjustified restrictive specifications and improperly sought to increase the scope and period of the TacCom IDIQ contract.

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.

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CONTACTS

Seth Locke
Partner
Washington, D.C.
D +1.202.654.6267

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