Reprinted from The Government Contractor, with permission of Thomson Reuters. Copyright © 2013. Further use without the permission of West is prohibited. For further information about this publication, please visit *http://legalsolutions.thomsonreuters.com*, or call 800.328.9352.

The Government Contractor®

WEST®

Information and Analysis on Legal Aspects of Procurement

Vol. 55, No. 17 **May 1, 2013**

Focus

¶ 136

FEATURE COMMENT: Resolving The Conflict Between The Single-Award Prohibition In Large IDIQ Procurements And A Single-Award Best-Value Decision—In Case Of First Impression, COFC Rules Against GSA In Billion-Dollar Travel Services Procurement

The Federal Acquisition Regulation prohibits the award of a large indefinite-delivery, indefinite-quantity contract to only one contractor unless one of several narrow exceptions is present. See FAR 16.504(c)(1)(ii)(D). This general rule, which is triggered for procurements valued in excess of $103 million, is intended to ensure that a single contractor is not given a monopoly on a large IDIQ procurement in which it would be competing only against itself for task orders.

The meaning and scope of the so-called single-award prohibition for major IDIQ procurements has received scant judicial treatment until now. In *CW Gov't Travel, Inc. v. U.S.*, 2013 WL 1460458 (Fed. Cl. March 27, 2013); 55 GC ¶ 135, unsealed on April 11, 2013, the U.S. Court of Federal Claims ruled against the General Services Administration in a postaward bid protest involving ETS2, the next generation, $1.4 billion, electronic travel services procurement involving 76 civilian agencies. The plaintiff, CW Government Travel, Inc. (CWT), challenged GSA's decision to award only one ETS2 contract to Concur Technologies, Inc. (Concur). The single-source award, if not reversed, will give Concur a monopoly on the provision of electronic travel services to all civilian agencies until at least 2027.

In the decision, which the COFC acknowledged as a "case of first impression," the Court held that GSA's award of only one ETS2 contract to Concur violated the terms of FAR 16.504(c)(1)(ii)(D)'s single-award prohibition. *CW Government Travel* at 23. The COFC faulted GSA for deciding to award only one contract on the basis of a best-value decision, and invalidated GSA's attempt to invoke an exception that would have permitted a single award if there was only one contractor qualified and capable of performing the contract at a reasonable price. Going forward, the COFC's decision establishes interesting and significant precedent for large IDIQ procurements in which only two offerors participate.

FAR 16.504(c)(1)(ii)(D) Single-Award Prohibition—The desire of Congress to maximize competition in federal procurements is ingrained in FAR 16.504. FAR 16.504(c)(1)(i) establishes a "multiple award preference" for nearly all IDIQ procurements, and states that contracting officers "must, to the maximum extent practicable, give preference to making multiple awards" of IDIQ contracts arising under a single solicitation. The FAR identifies various criteria that agencies must consider to achieve this end, including the scope and complexity of the procurement, the expected duration of the contract, and the ability to "maintain competition among the awardees throughout the contracts' period of performance." FAR 16.504(c)(1)(ii)(A).

Despite the manifest benefits of task order competitions among IDIQ contractors, the FAR still affords agencies a degree of discretion to decide whether to award more than one IDIQ contract. This is not the case with large IDIQ procurements in excess of $103 million. FAR 16.504(c)(1)(ii)(D) states that "[n]o task or delivery order contract in an amount estimated to exceed $103 million … may be awarded to a single source unless the head of the agency determines in writing" that one of several exceptions are present. Thus, in addition to requiring agencies to award at least two contracts to the "maximum extent practicable," the FAR raises the burden for large IDIQ procurements by expressly

prohibiting a single award unless the agency is able to invoke a valid exception.

One Qualified and Capable Source Exception—Despite the ETS2 procurement's high value and 15-year period of performance, GSA only received offers from CWT, one of three first-generation ETS1 incumbents, and Concur, a non-incumbent. In pre-award protests challenging the terms of the ETS2 solicitation, CWT had argued that the solicitation contained terms and conditions that were contrary to commercial practice, in violation of FAR pt. 12, among other deficiencies. CWT contended that various solicitation deficiencies discouraged the other two ETS1 incumbents from participating in this large, 15-year, follow-on procurement. See generally *CWTSatoTravel*, Comp. Gen. Dec. B-404479.2, 2011 CPD ¶ 87; *CW Gov't Travel, Inc. v. U.S.*, 99 Fed. Cl. 666 (2011); 53 GC ¶ 365.

GSA evaluated and rated the two proposals according to the solicitation's evaluation criteria and best-value scheme, and concluded that awarding a single contract to Concur would be most advantageous to the Government. GSA then issued a determination and findings (D&F) to authorize a single award. The D&F recapped the agency's best-value analysis, explaining that an award of only one contract to Concur would be more advantageous because Concur was rated technically very good with a lower price, while CWT was rated marginal with a higher price.

CWT's lower technical rating was based primarily on the fact that a number of requirements in CWT's system were not ready for testing during the evaluation phase, and would not be ready for further testing until several months after award, but at least one year before the enhanced system would be used by federal agencies. The D&F also considered the perceived benefits and risks associated with a single versus dual award.

Following this analysis, GSA invoked the exception that allows a single award if "[o]nly one source is qualified and capable of performing the work at a reasonable price to the Government." FAR 16.504(c)(1)(ii)(D)(1)(iii). GSA took the position that Concur was the only qualified and capable source because CWT's system was not fully ready for testing and thus not "acceptable for award."

The ETS2 Protest and the COFC's Ruling—CWT protested GSA's failure to award a second contract to CWT, initially at the Government Accountability Office and then at the COFC. GAO denied CWT's postaward protest, finding GSA's decision to invoke the "one qualified and capable source" exception reasonable. See *CWTSatoTravel*, Comp. Gen. Dec. B-404479.3, 2012 CPD ¶ 281 at 9–11. GAO also concluded that instances of unequal treatment were not prejudicial to CWT. Id. at 6.

CWT argued that GSA's determination that Concur was the only source qualified and capable of performing the ETS2 task orders was arbitrary and contrary to the record. CWT further argued that GSA's effective disqualification of CWT was the result of unequal treatment because Concur, like CWT, also offered to remedy areas of noncompliance months after contract award, but GSA did not treat Concur's assurance of postaward compliance as a basis to declare Concur unqualified or incapable of performing the work.

In its decision, the COFC agreed with CWT's principal arguments. It ruled that GSA did not satisfy the requirements of FAR 16.504(c)(1)(ii)(D)(1)(iii) and treated offerors unequally. There are several key legal implications of the COFC's decision in this case of first impression:

(1) Best Value Is Not a Valid Exception: The COFC first criticized the D&F because it merely "arrives at the conclusion that Concur is the only qualified and capable source because CWT received an overall rating of Marginal." *CW Government Travel* at 23–24. The Court held that the "government essentially conducted a best value tradeoff, which was inappropriate for purposes of FAR 16.504(c)(1)(ii)(D)(1)(iii)." Id. at 24.

Additionally, the COFC disagreed with GSA's argument that CWT's marginal rating justified the "one qualified and capable source" exception because a marginal rating is not an unacceptable rating. Under the solicitation, a marginal rating meant that a proposal did not "meet Government requirements necessary for acceptable contract performance, but issues are correctable." The Court emphasized the phrase "issues are correctable," and explained that these words make the marginal rating materially different from an unacceptable rating, which is defined as a proposal that has numerous weaknesses or deficiencies "that are not correctable."

The COFC acknowledged the seemingly conflicting intersection of the solicitations' best-value scheme on one hand, and the single-award prohibition of FAR 16.504(c)(1)(ii)(D) on the other hand. The apparent

 © 2013 Thomson Reuters

conflict arose because GSA received offers from only two contractors.

Instead of selecting for award the top two "best-value" offerors out of a crowded field, GSA was faced with a situation in which the FAR mandated the award of two IDIQ contracts (absent a valid exception). But GSA had only two offers to select to comply with the FAR mandate, one of which had the lowest technical rating and highest price.

The COFC's decision means that agencies are not permitted to award only one contract based on their opinion as to whether a single award would be the "best value" or "most advantageous" to the Government. Instead, agencies are required to comply with FAR 16.504(c)(1)(ii)(D)(1)(iii), conduct a valid analysis of the second offeror's qualifications and ability to perform the contract, and award a second contract if the offeror is indeed a qualified and capable source, irrespective of the offeror's standing in a best-value analysis.

(2) FAR 16.504(c)(1)(ii)(D)(1)(iii) Exception Applies to the Company, Not Just the Proposal: A second critical conclusion in the COFC's decision is the Court's determination that the exception at FAR 16.504(c)(1)(ii)(D)(1)(iii) applies to the company, not just the company's proposal. GSA's analysis in the D&F focused on whether CWT's proposal adequately demonstrated CWT's qualification and capability to perform the ETS2 task orders. The COFC explained, however, that CWT's marginal rating "was not consistent with a finding that CWT, either the company or its [final proposal revision], was not qualified and capable of performing the ETS2 work." *CW Government Travel* at 24.

Having concluded that the FAR 16.504(c)(1)(ii)(D)(1)(iii) exception requires an analysis of the company's qualifications and capabilities, the Court then proceeded to analyze CWT's qualifications and capabilities as reflected in the contemporaneous record. The Court observed that the record "appears to conflict with any alleged determination that CWT is not qualified and capable of performing the work" because GSA specifically awarded CWT strengths for the "experience and capabilities" of CWT and its team members, which GSA found to be "unmatched by any other potential offeror." Id. The COFC further noted that GSA determined that the CWT team had experienced resources and knowledge of the ETS1 customers, which had the "potential for reducing migration tasks or shortening the time to perform the [request for proposals] requirements to meet goals and to minimize disruption, costs, and time required to integrate agency systems to ETS2." Id.

The Court's analysis is significant because it reinforces the principle that agencies are not permitted to escape the single-award prohibition of FAR 16.504(c)(1)(ii)(D) by selecting which *proposal* represents the best value. Instead, to invoke the "one qualified and capable source" exception, agencies must ascertain whether the *company* is a source that has the minimum qualifications and capabilities to compete for and perform subsequent task orders.

The Court's conclusion not only is consistent with the text of FAR 16.504(c)(1)(ii)(D)(1)(iii), but it is reasonable when viewed in the context of the larger IDIQ procurement at hand. The subject of FAR 16.504(c) is the award of master IDIQ contracts, not task orders. To achieve the policy objectives of maximizing competition, it is logical to require agencies to award at least two IDIQ contracts for large procurements in excess of $103 million, as long as there are at least two *companies* with the necessary qualifications and capabilities to perform task orders.

A proposal may not represent the best value in a traditional head-to-head competition, but when very large IDIQ procurements are at stake, there is a compelling public interest to have at least two contractors to compete against each other for task orders, even if this means awarding a second master contract to an offeror whose proposal at that stage otherwise would not represent the best value. The true best-value decision will then take place at the task order level.

(3) A Higher Comparative Price in a Best-Value Analysis Does Not Make the Price Unreasonable: In the litigation, GSA argued that the exception at FAR 16.504(c)(1)(ii)(D)(1)(iii), which allows one award if there is only one qualified source capable of performing the work at a "reasonable price," was valid because CWT's higher price was not reasonable. The COFC rejected this argument, again noting inconsistencies in the record.

The Court explained that the "D&F reflects that the government only selected Concur for award because it had a higher rating and lower relative price, not because CWT's price was 'unreasonable.' " Id. at 25. The Court cited specific statements in the record in which GSA found that CWT's price was "not competitive when compared" to Concur, or that it is "not reasonable" to pay a higher price for CWT's techni-

© 2013 Thomson Reuters

cally lower-rated proposal—both of which reflect a best-value, comparative approach. Id.

Moreover, the COFC highlighted the fact that GSA found that the overall prices, despite some unreasonable line-item prices for both offerors, were "fair and reasonable." Id. The Court's analysis further demonstrates that it is improper for an agency to apply a traditional best-value analysis for purposes of invoking the exception at FAR 16.504(c)(1)(ii)(D)(1)(iii), including whether the overall price is "reasonable."

(4) Prejudice is Tied to the Validity of the Exception, Not the Best-Value Decision: The COFC also ruled that GSA treated offerors unequally by permitting Concur to meet solicitation requirements months after contract award without deeming Concur unqualified or incapable of performing the contract, as GSA did with CWT. The COFC specifically held that "GSA treated CWT and Concur unequally by rejecting CWT's postaward compliance date but accepting Concur's promises." Id. at 27.

Notably, the COFC rejected GAO's conclusions with respect to prejudice. GAO had denied CWT's earlier protest ground alleging unequal treatment on the basis that it would not have impacted GSA's overall best-value decision. *CWTSatoTravel*, Comp. Gen. Dec. B-404479.3, 2012 CPD ¶ 281 at 6. The COFC concluded, in contrast, that CWT was competitively prejudiced by the unequal treatment because GSA relied on CWT's assurances of postaward compliance as a reason to invoke the exception at FAR 16.504(c)(1)(ii)(D)(1)(iii).

Since the FAR's requirement to award at least two contracts trumps the solicitation's best-value scheme, the COFC determined that it was incorrect for GAO to measure prejudice on the basis of the likely impact to the best-value decision. Instead, "in the context of FAR 16.504(c)(1)(ii)(D)(1)(iii), when an agency decided to make a single award and had to determine whether there was only a single source that was qualified and capable of performing the work at a reasonable price, such error could have impacted CWT's chance at obtaining an award."

(5) FAR 52.216-27, Single or Multiple Awards, Does Not Negate FAR 16.504(c)(1)(ii)(D): An additional noteworthy aspect of the COFC's decision is the interplay between FAR 52.216-27, Single or Multiple Awards, and the single-award prohibition of FAR 16.504(c)(1)(ii)(D).

Concur argued that CWT's protest was untimely because the solicitation included FAR 52.216-27, which states, "The Government may elect to award a single delivery order contract or task order contract or to award multiple delivery order contracts or task order contracts for the same or similar supplies or services to two or more sources under this solicitation." Concur contended that CWT waived its right to protest GSA's decision to award only one contract because CWT did not protest the inclusion of FAR 52.216-27 in the solicitation prior to proposal submission. See generally, *Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308 (Fed. Cir. 2007).

The COFC disagreed with Concur's argument that the incorporation of FAR 52.216-27 into the solicitation permitted GSA to award a single contract, irrespective of whether a valid exception to FAR 16.504(c)(1)(ii)(D) existed. The COFC noted that FAR 16.506(f) requires the incorporation of FAR 52.216-27 into any IDIQ solicitation that "may result in multiple contract awards." The Court held that CWT was not required to file a pre-award protest challenging the solicitation's inclusion of this FAR clause because "[r]eserving the right to make one award authorized GSA to do so assuming all other legal requirements were met," and "GSA still has to comply with FAR 16.504(c)(1)(ii)(D), which allows a single award if there is only one qualified and capable source." *CW Government Travel* at 27.

In other words, FAR 52.216-27 is a mandatory clause for all large IDIQ procurements that merely informs the offerors that there "may" be one or multiple awards. This notice, however, does not speak to the conditions when an agency is legally permitted to award only one contract.

(6) Court Denied GSA's Request to Dismiss for Lack of Standing: Finally, the COFC disagreed with GSA's argument that CWT lacked standing to protest on the basis that CWT received a marginal technical rating. The Court factually distinguished this case from other precedent finding that a marginally rated offeror did not have standing. *CW Government Travel* at 16 (distinguishing the facts in *Joint Venture of Comint Sys. Corp. v U.S.*, 102 Fed. Cl. 235 (2011), aff'd, 700 F.3d 1377 (Fed. Cir. 2012)).

The COFC explained, in part, that CWT challenged the fairness of GSA permitting Concur to remedy issues after contract award, but not allowing CWT to do the same. The Court noted that this

© 2013 Thomson Reuters

impacted GSA's determination that Concur was the only qualified and capable source. Since there were only two offerors, and the allegation was that GSA was required to award a second contract, the Court concluded that CWT had a substantial chance of receiving a contract.

This Feature Comment was written for The Government Contractor by* James Y. Boland *and* Lars E. Anderson*. The authors represented the plaintiff, CW Government Travel, Inc., in the subject bid protest as well as in the prior ETS2 bid protests referenced in this article.

© 2013 Thomson Reuters