

COMPETITION REQUIREMENTS IN  
GENERAL SERVICES ADMINISTRATION  
SCHEDULE CONTRACTS

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## I. INTRODUCTION

Competition in the government acquisition process is invariably a topic of discussion and great scrutiny, and the General Services Administration (GSA) Schedule program is no exception. Allegations of failures to meet minimum competition requirements and overpayment by the Government for goods and services have been well publicized in a variety of contexts,<sup>1</sup> and the GSA Schedule program has not escaped such notoriety.<sup>2</sup> As a result, there is an increased focus on enhancing competition requirements in the Government's procurement system. The Office of Management and Budget (OMB) has identified ordering procedures under indefinite-delivery/indefinite-quantity (ID/IQ) contracts, specifically including GSA Schedule contracts, as an area in which more competition should exist.<sup>3</sup>

The GSA Schedules program, also known as the Federal Supply Schedule (FSS) program or the Multiple Award Schedule (MAS) program, is the primary

1. See, e.g., PRESIDENT'S COUNCIL ON INTEGRITY AND EFFICIENCY, OVERSIGHT OF GULF COAST HURRICANE RECOVERY: A SEMI-ANNUAL REPORT TO CONGRESS 11 (2006). PCIE found government estimates indicated that 58.5 percent of the Hurricane Katrina contracts awarded before November 30, 2005, were noncompetitive. The urgent need for rapid response justified the allowing of no-bid contracts. However, the report concluded that 50.5 percent of the contracts were awarded noncompetitively long after emergency action was needed, and no-bid contracts are unjustified. *Id.* at 13. GAO found most DoD contracting officers did not follow GSA's established procedures intended to ensure fair and reasonable prices when using the Federal Supply Schedule for information technology orders. U.S. GEN. ACCOUNTING OFFICE, GAO 01-125, CONTRACT MANAGEMENT: NOT FOLLOWING PROCEDURES UNDERMINES BEST PRICING UNDER GSA'S SCHEDULE 4 (2000). Seventeen of the twenty-two orders, valued at \$60.5 million, were placed without seeking competitive quotes from multiple contractors. *Id.* at 6.

2. See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO-04-605, REBUILDING IRAQ: FISCAL YEAR 2003 CONTRACT AWARD PROCEDURES AND MANAGEMENT CHALLENGES 4 (2004). In this report, GAO stated that agencies did not always comply with competition requirements when issuing task orders under existing contracts. GAO found that of eleven task orders agencies issued under existing contracts, seven in whole or in part were not within scope and it had reservations about whether two additional orders were within scope. The Defense Contracting Command-Washington (DCC-W) placed two orders using a management improvement contract awarded under GSA's federal supply schedule program. Neither order involved management improvement activities. *Id.* at 4-5. The OSC found that the Administrative Resource Center did not satisfy competition requirements under the GSA schedule in issuing a \$140,000 sole-source task order for an organizational assessment. U.S. OFFICE OF SPECIAL COUNSEL, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-16, SELECTED CONTRACTING AND HUMAN CAPITAL ISSUES 3 (2005). In contracting with Military Professional Resources, Inc. (MPRI) for the organizational assessment, several required steps were not taken. Competition was not sought among schedule vendors and a determination of the reasonableness of MPRI's price was not documented. *Id.* at 7. This sort of micro scrutiny of schedule orders—even small ones like the one received by OSC—is not at all uncommon.

3. Memorandum from Paul A. Denett, Adm'r, Office of Mgmt. and Budget, to Chief Acquisition Officers and Senior Procurement Executives 1-3 (May 31, 2007). In this memorandum, Administrator Denett expressed concern that the acquisition workforce has not taken full advantage of the use of competition, "especially in the placement of task and delivery orders under indefinite-delivery vehicles." *Id.* at 1. Furthermore, Administrator Denett identifies several proposed policies that he intends to forward to the FAR Council with a request that the Council incorporate such policies into the FAR. Among the policies proposed is "[s]trengthening competition rules for Multiple Award Schedules (MAS) to generally ensure the receipt of three proposals and for other multiple award contracts to ensure fair notice is being provided to contract holders." *Id.* at 2.

source through which all government agencies and other eligible ordering activities purchase commercial items. The growth of the MAS program exploded in the mid-1990s with the passage of the Federal Acquisition Streamlining Act of 1994 (FASA)<sup>4</sup> and the Clinger-Cohen Act of 1996.<sup>5</sup> These two acts revolutionized the manner in which the Government acquires commercial items. Most significantly, FASA establishes a preference for acquiring commercial items and provides an expansive definition of “commercial item.”<sup>6</sup> Since the mid-1990s, purchases made by the Government under GSA Schedule contracts have increased exponentially, though growth has slowed recently, in part due to concern about inadequate competition for GSA Schedule services task orders. Still, in government Fiscal Year 2006, eligible ordering activities purchased nearly \$36 billion under GSA Schedule contracts,<sup>7</sup> making the GSA MAS program a highly attractive target for those who sound the trumpet in favor of acquisition reform.

To compound the issue, recent reports issued by the GSA inspector general (GSA IG) and the Government Accountability Office (GAO) have identified regular failures by agency contracting officers to follow even the limited competition requirements for awarding GSA Schedule contract task and delivery orders.<sup>8</sup> In December 2004, the GSA IG issued a report summarizing the findings of various audits that it had performed on the Federal Technology Service’s Regional Client Support Centers (CSCs).<sup>9</sup> The GSA IG found that the CSCs frequently failed to follow the required competition procedures for placing GSA Schedule contract task orders and “were not proactive in maintaining a competitive environment for task orders and, as a consequence, the Government did not obtain the benefits of competition and potentially lower costs.”<sup>10</sup> Subsequent audit reports issued by the GSA IG have reported significant improvements in compliance with the required competition procedures.<sup>11</sup> Similarly, in a 2004 report, GAO found that the Department of

4. Pub. L. No. 103-355, 108 Stat. 3243.

5. Pub. L. No. 104-106, 110 Stat. 642.

6. See Federal Acquisition Streamlining Act (FASA), §§ 8001, 8104, 8203, 108 Stat. at 3384–85, 3390–91, 3394–96; see also FAR 2.101.

7. U.S. GEN. SERVS. ADMIN., REP. NO. A060190/Q/6/P07004, REVIEW OF MULTIPLE AWARD SCHEDULE PROGRAM CONTRACT WORKLOAD MANAGEMENT 3 (2007). It should be noted that purchases placed against GSA Schedule contracts have increased in dollar value from \$10.5 billion in 1999 to \$25.6 billion in 2003 to \$35.8 billion in the most recent government fiscal year. *Id.* at 3.

8. See *supra* notes 1, 2.

9. U.S. GEN. SERVS. ADMIN., COMPENDIUM OF AUDITS OF THE FEDERAL TECHNOLOGY SERVICE REGIONAL CLIENT SUPPORT CENTERS 1 (2004) [hereinafter COMPENDIUM OF AUDITS 2004]; also see U.S. GEN. SERVS. ADMIN., REP. NO. A020144/T/5/Z04002, AUDIT OF FEDERAL TECHNOLOGY SERVICE’S CLIENT SUPPORT CENTERS 4 (2004) (stating that GSA has eleven regional CSCs to manage task and delivery orders placed against GSA Schedule 70 and other Information Technology contracts).

10. COMPENDIUM OF AUDITS 2004, *supra* note 9, at 5.

11. U.S. GEN. SERVS. ADMIN., COMPENDIUM OF AUDITS OF FEDERAL TECHNOLOGY SERVICE CLIENT SUPPORT CENTER CONTROLS 1 (2005); U.S. GEN. SERVS. ADMIN., COMPENDIUM OF AUDITS OF FEDERAL TECHNOLOGY SERVICE CLIENT SUPPORT CENTER CONTROLS 1 (2006).

Defense (DoD) had waived competition requirements for nearly half of the GSA Schedule task orders GAO examined in connection with its review.<sup>12</sup> Not surprisingly, given this environment, recent proposed legislation has sought to strengthen competition requirements for task and delivery orders placed against ID/IQ contracts, specifically including GSA Schedule contracts.<sup>13</sup>

This article first provides an overview of the GSA Schedule program. Then, we explore the limited competition requirements currently applicable to the award of GSA Schedule contract task and delivery orders. Next, we review bid protest jurisdiction for challenges to task and delivery orders placed against GSA Schedule contracts. Finally, we look at the Accountability in Government Contracting Act of 2007, a piece of recent legislation proposed to enhance competition in this particular area.

## II. INTRODUCTION TO THE MAS PROGRAM

### A. Overview of the MAS Program

Through the GSA MAS program, GSA negotiates and administers long-term (up to twenty years including options) governmentwide contracts with commercial item contractors. The MAS program allows eligible ordering activities to use a simplified acquisition process to obtain commonly used commercial supplies and services at volume discount pricing.<sup>14</sup> Under the program, GSA contracting officers negotiate indefinite-delivery, indefinite-quantity (ID/IQ) contracts with commercial item contractors for a wide variety of products and services commonly procured by the Government. During contract negotiation, GSA negotiates discounts based upon a negotiating goal of “most favored customer” pricing and makes a formal determination that the negotiated prices are fair and reasonable. As a general matter, this determination, made at contract inception, eliminates the need for ordering activities to make an independent assessment of fair and reasonable pricing at the time of order placement.<sup>15</sup>

As discussed in further detail below, orders placed against MAS contracts are made using the procedures described in Federal Acquisition Regulation (FAR) Subpart 8.4. Under FAR Subpart 8.4, ordering activities generally need

12. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-874, CONTRACT MANAGEMENT: GUIDANCE NEEDED TO PROMOTE COMPETITION FOR DEFENSE TASK ORDERS 3 (2004). In this report, GAO found that competition requirements were waived on thirty-four of seventy-four task orders reviewed and that such requirements were often waived at the program office's request due to a desire to retain the incumbent contractor. *Id.*

13. Accountability in Government Contracting Act (AGCA) of 2007, S. 680, 110th Cong. (as passed by Senate, Nov. 7, 2007). See *infra* Part V for a detailed discussion of the AGCA.

14. FAR 8.402(a). For a further discussion about the evolution of the GSA Schedule program, see Robert J. Sherry et al., *The Present and Future of MAS Contracting*, 27 PUB. CONT. L. J. 369 (1998).

15. GSAR 538.270(a), 538.271; see *ATA Def. Indus., Inc. v. United States*, 38 Fed. Cl. 489 (1997) (holding that this fair and reasonable determination at contract inception applies only to GSA Schedule contract items and not to so-called open market items added to a GSA Schedule contract order). See *infra* Part III.C for a discussion on the issue of fair and reasonable price determinations with respect to open market items.

not seek further competition, synopsise the requirement, make a separate determination of fair and reasonable pricing, or consider small business programs when placing orders under GSA Schedule contracts.<sup>16</sup> Instead, FAR Subpart 8.4 contemplates that the individual ordering agency will review vendors' GSA Schedule contracts and place an order with the vendor whose goods or services represent the best value and meet the agency's needs at the lowest overall cost.<sup>17</sup> In most cases, the ordering agency must solicit proposals from at least three GSA Schedule contractors.<sup>18</sup>

Under FAR Subpart 8.4, the ordering agency generally may, but is not required to, issue a Request for Quotation (RFQ).<sup>19</sup> By issuing an RFQ, the agency shifts the burden to the vendors for selecting the items from their GSA Schedules that will meet the agency's needs.<sup>20</sup> However, if an agency issues an RFQ, it must provide guidance about its selection criteria so that vendors may compete intelligently.<sup>21</sup> In *COMARK Fed. Sys.*,<sup>22</sup> GAO explained that when an agency intends to use the vendors' responses to an RFQ as the basis of a detailed technical evaluation and selection decision, it has elected to use an approach that is more like a competition in a negotiated procurement than in a simple FSS buy.<sup>23</sup> Thus, the RFQ must provide for fair and equitable competition.<sup>24</sup> Furthermore, even though the FAR Part 15 procedures applicable to negotiated procurements do not apply to the FSS program, to the extent that an agency elects to use competition procedures similar to those found in FAR Part 15, GAO will review the record to ensure that that the evaluation is reasonable and consistent with the terms of the solicitation and with standards generally applicable to negotiated procurements.<sup>25</sup>

16. FAR 8.404(a), (d).

17. FAR 8.404(d).

18. FAR 8.405-1(c)(1).

19. See *Paragon Sys., Inc.*, Comp. Gen. B-299548.2, 2007 WL 2874013 (Sept. 10, 2007); *SI Int'l, SEIT, Inc.*, Comp. Gen. B-297381.5, B-297381.6, 2006 WL 2166867 (July 19, 2006); *COMARK Fed. Sys.*, Comp. Gen. B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34, at 4. The contracting agency may issue an RFQ at its discretion and there are certain instances where it may be especially advisable to do so, including that the order requires a Statement of Work, see FAR 8.405-2, or the offer includes a brand name specification where justification is required, see FAR 8.405-1(c)(2). The only time agencies are required to issue a SOW is when ordering services priced at hourly rates established in a contractor's GSA Schedule contract. See FAR 8.405-2(a).

20. *COMARK Fed. Sys.*, 98-1 CPD ¶ 34, at 4.

21. *Id.*

22. *Id.* at 5.

23. *Id.*

24. *Id.*

25. See *GlassLock, Inc.*, Comp. Gen. B-299931, B-299931.2, Oct. 10, 2007, 2007 CPD ¶ 216, at 3; *Paragon Sys., Inc.*, Comp. Gen. B-299548.2, 2007 WL 2874013 (Sept. 10, 2007); *SI Int'l, SEIT, Inc.*, Comp. Gen. B-297381.5, B-297381.6, 2006 WL 2166867, at \*5 (July 19, 2006); *Computer Prods. Inc.*, Comp. Gen. B-284702, May 24, 2000, 2000 CPD ¶ 95, at 4-5; see also *System Plus, Inc. v. United States*, 68 Fed. Cl. 206, 210 (2005) (holding that a debriefing was not required in a solicitation issued pursuant to FAR subpart 8.4 because the debriefing requirement of FAR part 15 was not implicated by the solicitation, and only those standards for competitive procurements found in FAR part 15 that are implicated by the particular procurement apply). But see *Ellsworth Assoc., Inc. v. United States*, 45 Fed. Cl. 388, 394 (1999) (rejecting protestor's argument that the agency must comply with FAR part 15 in evaluating proposals when the solicitation was issued as a GSA Schedule contract buy).

### B. *Products and Services Are Both Available Under GSA Schedule Contracts*

Contractors may offer both products and services under GSA Schedule contracts.<sup>26</sup> Supplies (i.e., products) must be offered at fixed prices negotiated at the time of award.<sup>27</sup> Services are priced either at hourly rates or at a fixed price for performance of a specific task (e.g., installation, maintenance, and repair).<sup>28</sup> In addition, GSA Schedule contractors may enter into contractor team arrangements (CTAs) that allow two or more GSA Schedule contractors to team together to meet agency requirements by utilizing a combination of the approved products and/or services available on their respective GSA Schedule contracts.<sup>29</sup>

#### 1. Contractor Team Arrangements

In a CTA, each team member must have a GSA Schedule contract to participate in proposals for GSA Schedule orders.<sup>30</sup> In practice, CTAs operate much like traditional prime contractor/subcontractor arrangements, but each CTA member contractor technically retains contractual privity with the ordering activity.<sup>31</sup> The CTA must be in writing and must detail the responsibilities of each team member.<sup>32</sup> The CTA should include the names of the team members, along with their respective GSA Schedule contract numbers, as well as a description of the responsibilities of each team member.<sup>33</sup> GSA recommends that ordering activities review written CTA agreements to ensure that each team member's responsibilities are clearly delineated; however, there is no requirement that ordering activities review or even request a copy of the CTA agreement.<sup>34</sup> Although GSA does not approve CTA agreements for contractors,<sup>35</sup> it has developed a list of items that it strongly encourages contractors to include.<sup>36</sup>

#### 2. Blanket Purchase Agreements

Agencies may issue blanket purchase agreements (BPAs) against GSA Schedule contracts to fill repetitive requirements for products or services.<sup>37</sup>

26. FAR 8.404(d).

27. *Id.*

28. *Id.*

29. See FAR subpt. 9.6.

30. U.S. Gen. Servs. Admin., Frequently Asked Questions, [http://www.gsa.gov/Portal/gsa/ep/contentView.do?faq=yes&pageTypeId=8199&contentId=8124&contentType=GSA\\_OVERVIEW](http://www.gsa.gov/Portal/gsa/ep/contentView.do?faq=yes&pageTypeId=8199&contentId=8124&contentType=GSA_OVERVIEW) (last visited Mar. 2, 2008).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. See U.S. Gen. Servs. Admin., Elements of a Contractor Team Arrangement (CTA) Document, [http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=18047&programPage=%2Fep%2Fprogram%2FgsaBasic.jsp&channelId=13527&oid=8124&pageTypeId=8199&P=FX7&programId=10157&contentType=GSA\\_BASIC](http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=18047&programPage=%2Fep%2Fprogram%2FgsaBasic.jsp&channelId=13527&oid=8124&pageTypeId=8199&P=FX7&programId=10157&contentType=GSA_BASIC) (last visited Mar. 2, 2008).

37. FAR 8.405-3.

The ordering agency has discretion to establish BPAs with one or more GSA Schedule contractors,<sup>38</sup> based upon a specific list of factors set forth in FAR 8.405-3(a).<sup>39</sup> In addition to the ordering procedures identified in FAR 8.401-1 and 8.405-2, as discussed in further detail below, ordering activities also must structure BPAs to address the frequency of ordering, invoicing, discounts, requirements (e.g., estimated quantities, work to be performed), delivery locations, and time.<sup>40</sup> Finally, multi-agency BPAs are permitted so long as the BPA identifies the participating agencies and their estimated requirements at the time the BPA is established.<sup>41</sup>

If an ordering activity establishes a single BPA with a GSA Schedule contractor, it may place orders directly under the BPA when it requires products and/or services within scope of the BPA.<sup>42</sup> However, if an ordering activity places multiple BPAs with more than one GSA Schedule contractor for the same products or services, then the ordering activity must forward its requirement to “an appropriate number of BPA holders, as established in the BPA ordering procedures,”<sup>43</sup> and place the order with the BPA holder that represents the best value to the Government.<sup>44</sup> As with orders placed generally under GSA Schedule contracts, BPAs for hourly rate services require a statement of work and the BPA must identify a price for the performance of each task.<sup>45</sup> Finally, BPAs generally should not exceed five years in length and must be reviewed by the ordering activity on an annual basis.<sup>46</sup>

### C. Authorized Purchasers

GSA Order ADM 4800.2E, Eligibility to Use GSA Sources of Supply and Services, identifies the agencies, activities, and organizations, known as “eligible ordering activities,” that are eligible to use GSA Schedule contracts. In addition, pursuant to the “cooperative purchasing” initiative in which Schedule 70 Information Technology contractors may participate at their option, state and local governments may purchase information technology products and services under GSA Schedule contracts.<sup>47</sup>

Finally, under a recent optional modification<sup>48</sup> issued by GSA for all GSA Schedule contractors, state and local governments are authorized to use GSA

38. FAR 8.405-3(a)(1).

39. These factors include (i) the scope and complexity of the requirement(s); (ii) the need to periodically compare multiple technical approaches or prices; (iii) the administrative costs of BPAs; and (iv) the technical qualifications of the schedule contractor(s). *Id.*

40. FAR 8.405-3(a)(2).

41. FAR 8.405-3(a)(4).

42. FAR 8.405-3(b)(1).

43. FAR 8.405-3(b)(2)(i).

44. FAR 8.405-3(b)(2)(ii).

45. FAR 8.405-3(b)(3).

46. FAR 8.405-3(c)-(d).

47. See E-Government Act of 2002, Pub. L. No. 107-347, § 211, 116 Stat. 2899, 2939; GSAR 538.7002.

48. U.S. Gen. Servs. Admin., Modification FX-47, Recovery Purchasing, *available at* <https://mcm.fas.gsa.gov/cmservlet/PDF/FX47/SF30.pdf> (applicable to all GSA Schedule contracts).

Schedule contracts to facilitate recovery from any major disaster declared by the president under the Robert T. Stafford Disaster Relief and Emergency Assistance Act<sup>49</sup> or to facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack.<sup>50</sup>

### III. COMPETITION REQUIREMENTS IN MAS CONTRACTS

#### A. *General Standard: Competition in Contracting Act (CICA)*

CICA provides:

[T]he head of an agency in conducting a procurement for property or services shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the Federal Acquisition Regulation.<sup>51</sup>

FAR Part 2 defines “full and open competition” as permitting all responsible sources to compete.<sup>52</sup> Use of GSA Schedule contracts is a competitive procedure if (1) they are open to all responsible sources and (2) orders and contracts result in the lowest overall cost alternative to meet the needs of the Government.<sup>53</sup> Accordingly, orders placed under GSA Schedule contracts fulfill the requirements of CICA.

#### 1. FAR Subpart 8.4 Ordering Procedures

As a general matter, the competition procedures in FAR Parts 13, 14, 15 and the Small Business Program rules in FAR Part 19 do not apply to orders placed against GSA Schedule contracts.<sup>54</sup> However, if a BPA issued against a GSA Schedule contract includes terms that are inconsistent with the terms of the underlying GSA Schedule, then these exemptions do not apply.<sup>55</sup> In addition, while ordering activities are not required to follow the mandatory small business program rules found in FAR Part 19, they are encouraged to consider small businesses for award, and they receive credit toward their small business

49. 42 U.S.C. § 5121 *et seq.*

50. GSAR 538.7102(a). This provision implements section 833 of the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006), which amends 40 U.S.C. § 502 to authorize the administrator of GSA to provide to state and local governments the use of Federal Supply Schedules of the GSA for purchase of products and services to be used to facilitate recovery from a major disaster declared by the president under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 *et seq.*, or to facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack. *Id.* In the event of a declared disaster, the secretary of the Department of Homeland Security shall determine which products and services may be used to facilitate recovery from the declared disaster or attack. GSAR 538.7102(b).

51. Competition in Contracting Act of 1984, 10 U.S.C. § 2304 (2000); 41 U.S.C. § 253 (2000).

52. FAR 2.101.

53. 41 U.S.C. § 259(b)(3) (2000); *see* FAR 6.102(d)(3), 8.404(a).

54. FAR 8.404(a).

55. *See id.*

goals when placing orders with small business GSA Schedule contractors.<sup>56</sup> Finally, as stated above, orders placed against GSA Schedule contracts using the procedures of FAR Subpart 8.4 are considered to be issued using full and open competition.<sup>57</sup> Accordingly, ordering activities are not permitted to seek competition outside the MAS program for such orders and shall not synopsize the requirement.<sup>58</sup>

*a. Fair and Reasonable Pricing Determination Already Made*

Before awarding any GSA Schedule contract, the contracting officer must make a determination that the negotiated pricing is fair and reasonable.<sup>59</sup> The contracting officer must document this determination using FAR 15.406-3 as guidance.<sup>60</sup> GSA Schedule pricing is negotiated based on discounts from the contractor's established catalog prices.<sup>61</sup> The contracting officer negotiates fixed prices for products, and fixed, fully burdened hourly (or daily) labor rates for specific labor categories that may be ordered on a task-by-task basis.<sup>62</sup> Ordering activities are only required to make a separate determination of fair and reasonable pricing when placing orders requiring a Statement of Work (SOW).<sup>63</sup> Finally, ordering activities are encouraged to seek additional discounts from GSA pricing when placing GSA Schedule contract orders.<sup>64</sup> For orders over the maximum order threshold established for a particular SIN, ordering activities *must* seek additional discounts to the approved GSA Schedule prices.<sup>65</sup> For orders below the maximum order threshold, this requirement is not mandatory.<sup>66</sup> It is important to note that the regulations do not require GSA contractors to provide additional discounts; they require only that the contracting officer seek additional discounts.<sup>67</sup> As a practical matter, however, and particularly in the information technology arena, "spot" discounting to the approved GSA Schedule pricing is most frequently the norm, even for orders below the maximum order threshold.

2. Ordering Procedures for Orders Not Requiring a Statement of Work

For orders placed by ordering activities that do not require a SOW, that is, fixed-price orders and task-based orders where pricing has already been

56. See FAR 8.405-5.

57. FAR 8.404(a) (citing FAR 6.102(d)(3)).

58. *Id.*

59. See FAR 8.404(d); GSAR 538.271(b).

60. GSAR 538.271(b). However, FAR part 15 does not apply, in and of itself, to GSA MAS contracts. See FAR 8.404(a); see also COMARK Fed. Sys., Comp. Gen. B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34, at 3-4; SI Int'l, SEIT, Inc., Sys., Comp. Gen. B-297381.5, B-297381.6, 2006 WL 2166867, at \*7 (July 19, 2006).

61. GSAR 538.271(a).

62. FAR 8.404(d).

63. *Id.*

64. FAR 8.405-4.

65. FAR 8.405-1(d).

66. FAR 8.405-4.

67. *Id.*

determined by GSA to be fair and reasonable, ordering activities must follow specific ordering procedure guidelines based upon the size of the order.<sup>68</sup> For orders at or below the micro-purchase threshold, currently \$3,000,<sup>69</sup> the contracting officer may place the order with any GSA Schedule contractor that can meet the agency's needs.<sup>70</sup> Here, ordering activities are encouraged to solicit from a number of GSA Schedule contractors and to attempt to distribute orders among contractors; however, they are not required to do so.<sup>71</sup>

For orders exceeding the micro-purchase threshold but not exceeding the maximum order threshold,<sup>72</sup> ordering activities must place orders with GSA Schedule contractors on a best-value basis.<sup>73</sup> Here, the contracting officer must survey at least three GSA Schedule contract holders through GSA's on-line ordering system, GSA Advantage!<sup>74</sup>

Finally, for orders that exceed the maximum order threshold, the contracting officer is required to seek additional discounts from the pricing in the contractor's approved GSA pricelist.<sup>75</sup> However, as noted above, the regulations specifically provide that the contractor is not under any obligation to offer additional discounts.<sup>76</sup> In addition, the contracting officer must (1) review the GSA pricelists of more than three GSA Schedule contractors, which may be done using GSA Advantage!; (2) seek additional price reductions from the contractor(s) considered to offer the best value; and (3) after seeking price reductions, place the order with the GSA Schedule contractor that provides the best value, whether or not additional price reductions are granted.<sup>77</sup> For orders over the maximum order threshold, the contracting officer is required to document the GSA Schedule contracts considered, noting the contractor from which the order was placed, as well as a description of the supply or service purchased and the amount paid.<sup>78</sup>

68. FAR 8.405-1.

69. See FAR 2.101.

70. FAR 8.405-1(b).

71. *Id.*

72. Each GSA Schedule contract contains multiple special item numbers (SINs) that are essentially categories of products and services that may be offered under the particular GSA Schedule. When a contractor is awarded a GSA Schedule contract, the contract will identify which SINs are offered under the contract and the products and services offered in each. The maximum order threshold is established on a SIN-by-SIN basis in each GSA Schedule contract.

73. FAR 8.405-1(c). In addition to considering price, ordering activities may consider the following factors when determining best value: (i) past performance, (ii) special features of the supply or service required for effective program performance, (iii) trade-in considerations, (iv) probable life of the item selected as compared with that of a comparable item, (v) warranty considerations, (vi) maintenance availability, (vii) environmental and energy efficiency considerations, and (viii) delivery terms. FAR 8.405-1(c)(3).

74. FAR 8.405-1(c)(1).

75. FAR 8.405-1(d).

76. FAR 8.405-4.

77. FAR 8.405-1(d).

78. FAR 8.405-1(e).

### 3. Ordering Procedures for Orders Requiring a SOW (FAR 8.405-2)

#### a. SOW Requirements

The ordering activity is required to issue a SOW only when placing orders under a GSA Schedule contract for services priced at hourly rates,<sup>79</sup> but may issue a SOW in connection with other types of GSA Schedule orders.<sup>80</sup> When issuing a SOW, ordering activities must follow the procedures set forth in FAR 8.405-2.<sup>81</sup> At a minimum, the SOW must identify (1) the work to be performed, (2) location of work, (3) period of performance, (4) deliverable schedule, (5) applicable performance standards, and (6) any special requirements (e.g., security clearances, travel, special knowledge).<sup>82</sup> Finally, to the maximum extent practicable, the SOW should be prepared in accordance with the rules for performance-based contracts set forth in FAR Subpart 37.6.<sup>83</sup>

#### b. RFQ Procedures

The contracting activity must follow certain procedures when issuing an RFQ under a GSA Schedule contract.<sup>84</sup> First, it must provide the RFQ, including the SOW and evaluation criteria, to GSA Schedule contractors that offer services that will meet the agency's needs.<sup>85</sup> As with the requirements for orders not requiring a SOW, ordering activities must follow specific ordering procedure guidelines based upon the size of the order.<sup>86</sup> For orders at or below the \$3,000 micro-purchase threshold, an order may be placed with any GSA Schedule contractor that can meet the agency's needs.<sup>87</sup> Here again, the contracting officer should attempt to distribute orders among contractors, but such distribution is not required.<sup>88</sup>

For orders that exceed the micro-purchase threshold but are under the maximum order threshold, the ordering activity must (1) develop a SOW in accordance with FAR 8.405-2(b); (2) provide the RFQ, along with the SOW and evaluation criteria, to at least three GSA Schedule contractors that offer services that will meet the agency's needs; and (3) request that contractors submit firm-fixed prices to perform the services identified in the SOW.<sup>89</sup> Finally, as with orders not requiring a SOW, contracting activities must follow

79. FAR 8-405(2)(a).

80. See, e.g., Paragon Sys., Inc., Comp. Gen. B-299548.2, 2007 WL 2874013 (Sept. 10, 2007); SI Int'l, SEIT, Inc., Comp. Gen. B-297381.5, B-297381.6, 2006 WL 2166867 (July 19, 2006); COMARK Fed. Sys., Comp. Gen. B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34.

81. FAR 8.405-2(a).

82. FAR 8.405-2(b).

83. *Id.*

84. FAR 8.405-2(c).

85. *Id.*

86. *Id.*

87. FAR 8-405-2(c)(1).

88. *Id.*

89. FAR 8.405-2(c)(2).

additional competitive procedures for orders exceeding the maximum order threshold.<sup>90</sup> In such instances, the ordering activity must provide the RFQ to more than three GSA Schedule contractors<sup>91</sup> and seek additional price reductions.<sup>92</sup> Further, for orders over the maximum order threshold, the contracting activity must provide the RFQ (including the SOW and the evaluation criteria) to any GSA Schedule contractor who requests a copy.<sup>93</sup>

Ordering activities may satisfy RFQ requirements by using GSA's *e-Buy* application. *e-Buy*, a component of GSA Advantage!, is an electronic request for quote (RFQ)/request for proposal (RFP) tool that permits government buyers to request information, identify sources of supply, and prepare and distribute RFQs/RFPs online.<sup>94</sup> Ordering activities may post RFQs in the *e-Buy* system for a designated period of time.<sup>95</sup> The request should designate the type of GSA Schedule contract required and identify the SIN category.<sup>96</sup> Through *e-Buy*, the ordering activity may send the RFQ to all companies with GSA Schedule contracts offering items in the particular SINs required by the RFQ, or the RFQ may be sent only to specific GSA contractors.<sup>97</sup> GSA contractors may submit proposals responsive to RFQs directly through the *e-Buy* system.<sup>98</sup>

#### B. *Small Business Programs Are Generally Not Applicable to GSA Schedule Orders*

As a general matter, FAR Part 19 (Small Business Programs) is not applicable to orders placed under GSA Schedule contracts.<sup>99</sup> There are two exceptions to this general rule:<sup>100</sup> first, for awards of BPAs to GSA Schedule contractors on terms that are not consistent with the contractor's GSA contract,<sup>101</sup> and second, for acquisitions of "bundled" requirements.<sup>102</sup> In all other cases, the Small Business Program requirements in FAR Part 19 do not apply to GSA Schedule contract orders.<sup>103</sup>

90. FAR 8.405-2(c)(3).

91. FAR 8.405-2(c)(3)(i). When determining the appropriate number of additional schedule contractors, the contracting officer may consider, among other factors, the complexity, scope, and estimated value of the requirement, as well as the results of market search. *Id.*

92. FAR 8.405-2(c)(3)(ii).

93. FAR 8.405-2(c)(4).

94. U.S. Gen. Servs. Admin., *e-Buy*, [https://www.ebuy.gsa.gov/advgsa/advantage/ebuy/start\\_page.do](https://www.ebuy.gsa.gov/advgsa/advantage/ebuy/start_page.do) (last visited Mar. 2, 2008).

95. U.S. Gen. Servs. Admin., *How Does e-Buy Work?* [http://www.gsa.gov/Portal/gsa/ep/contentView.do?programId=8456&channelId=13828&oooid=11870&contentId=12331&pageTypeId=8199&contentType=GSA\\_BASIC&programPage=%2Fep%2Fprogram%2FgsaBasic.jsp&P=FX9](http://www.gsa.gov/Portal/gsa/ep/contentView.do?programId=8456&channelId=13828&oooid=11870&contentId=12331&pageTypeId=8199&contentType=GSA_BASIC&programPage=%2Fep%2Fprogram%2FgsaBasic.jsp&P=FX9) (last visited Mar. 2, 2008).

96. *Id.* See *supra* note 72.

97. *How Does e-Buy Work?* *supra* note 95.

98. *Id.*

99. FAR 8.404(a); *Info. Ventures, Inc., Comp. Gen. B-291952*, May 14, 2003, 2003 CPD ¶ 101, at 2 (holding that FAR 8.404(a) obviates the need for agencies to follow the so-called rule of two found in FAR 19.502-2(b) when purchases are made under a GSA MAS contract).

100. See FAR 8.404(a).

101. FAR 13.303-2(e)(3).

102. FAR 19.202-1(e)(1)(iii).

103. FAR 8.404(a).

Furthermore, agencies are not obligated to conduct procurements on a small business set-aside basis even if the procurement involves the same requirements that have been awarded as a small business set-aside contract in the past.<sup>104</sup> In *Global Analytic*, an interested bidder protested the terms of an RFQ issued by the army under an FSS Schedule 70 contract arguing that “equity and fairness” required that the solicitation be set aside for small businesses because it had been previously set aside for small businesses.<sup>105</sup> GAO disagreed, finding that FAR 8.404(a) specifically provides that FAR Part 19 is not applicable to orders placed against GSA Schedule contracts.<sup>106</sup> There is, however, nothing in FAR Subpart 8.4 that prevents the contracting agency from setting aside a GSA MAS procurement for small businesses so long as the RFQ contains express notice of such restriction.<sup>107</sup>

### C. Open Market Items

For administrative convenience, the contracting activity may purchase goods and/or services not approved for sale on the contractor’s GSA Schedule contract pricelist (commonly referred to as “open market items”) along with approved contract items. To properly acquire “open market items,” the contracting activity must, under current rules, meet the following four conditions: (1) all applicable acquisition regulations pertaining to the purchase of the items not on the GSA Schedule contract have been followed (e.g., publicizing (FAR Part 5), competition requirements (FAR Part 6), acquisition of commercial items (FAR Part 12), contracting methods (FAR Parts 13, 14, and 15), and small business programs (FAR Part 19)); (2) the contracting officer has determined that the price for the items not on the GSA Schedule contract is fair and reasonable; (3) the items are clearly labeled on the order as items not on the GSA Schedule contract; and (4) all clauses applicable to items not on the GSA Schedule contract are included in the order.<sup>108</sup> For a period of time in the 1990s, GSA Schedule contract terms and conditions and the GAO generally permitted the acquisition of “incidental” amounts of “open market items” without having to meet these additional competition requirements.<sup>109</sup> As discussed below, the courts, and later GAO, rejected this practice as inconsistent with CICA.

The seminal case on the treatment of open market items in a GSA Schedule competition is *ATA Defense Industries, Inc.*<sup>110</sup> Prior to *ATA Defense Industries*, GAO had allowed contracting officers to purchase both GSA Schedule contract

104. Global Analytic Info. Tech. Servs., Inc., Comp. Gen. B-297200.3, Mar. 21, 2006, 2006 CPD ¶ 53, at 2.

105. *Id.*

106. *Id.*

107. Millennium Data Sys., Inc., Comp. Gen. B-292357.2, Mar. 12, 2004, 2004 CPD ¶ 48, at 8.

108. FAR 8.402(f).

109. Dictaphone Corp., Comp. Gen. B-254920, Jan. 6, 1994, 94-1 CPD ¶ 6, at 3; Raymond Corp., Comp. Gen. B-246410, Mar. 2, 1992, 92-1 CPD ¶ 252, at 3.

110. *ATA Def. Indus., Inc. v. United States*, 38 Fed. Cl. 489 (1997).

items and items incidental thereto, the so-called open market items, in a single order.<sup>111</sup> In *ATA Defense Industries*, the Court of Federal Claims made clear that open market items are subject to the competition requirements of CICA. The court explained that purchasing open market items along with a GSA Schedule order

is fundamentally inconsistent with Congress' unambiguous statutory mandate in the CICA to allow a contracting officer, when purchasing products against the FSS, to include in the purchase order "incidental" products that are competitively available, unless the prices charged for these "incidental" products are the product of full and open competition. As noted above, Congress unequivocally states in 10 U.S.C. § 2304(a)(1)(A) that in conducting a procurement, unless an exception applies, an agency "shall obtain full and open competition through the use of competitive procedures" . . . these exceptions are specific and narrow in scope. There is no exception that even arguably covers "incidentals."<sup>112</sup>

The court went on to explain that the conclusion that GSA Schedule prices are competitive is "necessarily based on price negotiations and evaluations that preceded the inclusion of the specified products and prices in the FSS contract."<sup>113</sup> Because GSA does not negotiate or evaluate prices for open market items, these items do not meet the full and open competition requirements of CICA like GSA Schedule contract items approved by a duly authorized GSA contracting officer.<sup>114</sup> The court concluded that unless open market items fall within an exception to CICA's competition requirement found in 10 U.S.C. § 2304 or they are classified as *de minimis*, they must be purchased using the competitive procedures required by 10 U.S.C. § 2302, that is, (1) they must be open to all responsible sources and (2) orders and contracts under such program result in the lowest overall cost alternative to meet the needs of the United States.<sup>115</sup>

The decisions that followed *ATA Defense Industries* confirm that an agency is not permitted to purchase open market items in an amount exceeding the micro-purchase threshold using the FSS procedures set forth in FAR subpart 8.4.<sup>116</sup> In *Symplcity Corp.*, the contracting agency failed to consider whether a category of services included in a task order was included on the awardee's approved GSA Schedule contract pricelist.<sup>117</sup> The RFQ identified nine "major"

111. ViON Corp., Comp. Gen. B-275063.2, B-275069.2, Feb. 4, 1997, 97-1 CPD ¶ 53, at 4; *Raymond Corp.*, 92-1 CPD ¶ 252, at 103; *Amray, Inc.*, 69 Comp. Gen. 456, 90-1 CPD ¶ 480, at 458 (1990); *Rack and Stanley*, 61 Comp. Gen. 414, 82-1 CPD ¶ 494, at 415 (1982). See *Sherry et al.*, *supra* note 14, at 381-82, for a more detailed discussion of the pre-*ATA* treatment of open market item issues by GAO.

112. *ATA Def. Indus., Inc.*, 38 Fed. Cl. at 502-03.

113. *Id.* at 503.

114. *Id.*

115. *Id.*

116. *KEI Pearson, Inc.*, Comp. Gen. B-294226.3, B-294226.4, Jan. 10, 2005, 2005 CPD ¶ 12, at 6; *CourtSmart Digital Sys., Inc.*, Comp. Gen. B-292995.2, B-292995.3, Feb. 13, 2004, 2004 CPD ¶ 79, at 5; *Symplcity Corp.*, Comp. Gen. B-291902, Apr. 29, 2003, 2003 CPD ¶ 89, at 5.

117. *Symplcity Corp.*, 2003 CPD ¶ 89, at 5.

performance requirements,<sup>118</sup> but two of the labor categories identified in the RFQ were not included on the awardee's approved GSA Schedule contract pricelist.<sup>119</sup> GAO concluded that award of a task order to the awardee had been improper because "an agency cannot lawfully use the FSS ordering procedures to order services that are not contained on the vendor's schedule contract."<sup>120</sup>

Next, in *CourtSmart Digital Systems*, GAO sustained a protest of the Social Security Administration's award of a GSA Schedule contract order, finding that one of the items required by the RFQ was not contained in the awardee's approved GSA Schedule contract pricelist and that the GSA Schedule contract of a proposed teaming partner included in the awardee's proposal had expired.<sup>121</sup> GAO concluded: "where, as here, an agency solicits quotations from vendors for purchase from the FSS, the issuance of a purchase order to a vendor whose quotation includes a non-FSS item priced above the micro-purchase threshold is improper."<sup>122</sup>

In *KEI Pearson Inc.*, GAO carried the holdings of *ATA Defense Systems*, *Symlicity*, and *CourtSmart Digital Systems* to a perhaps illogical (or logical but not cost-effective) conclusion by finding that the award of a task order was improper because the awardee's proposal included products from one manufacturer, identified as open market items, and also included a notation stating that the items were being procured under an alliance agreement with the vendor instead of a GSA Schedule contract because the former would result in a significant cost savings to the Government.<sup>123</sup> GAO found the award of the task order improper because the revised final cost/price quotation submitted by the awardee showed that certain products were being purchased through an alliance agreement, albeit at a lower cost, and were not being purchased through a GSA Schedule contract, "which was not in accordance with the rules governing the use of the FSS and the terms of the RFQ."<sup>124</sup> GAO stated:

GSA's evaluation of CSC's quotation was not in accordance with the rules governing the use of the FSS and the terms of the RFQ. In this regard, CSC's quotation clearly shows that CSC quoted a non-schedule "alliance agreement" price for BEA products, which the quotation indicated represented "a significant savings" relative to a price from an FSS source for these products. In fact, CSC recognized its noncompliance with the terms of the RFQ, as reflected by the statement in its quotation that "[i]f required," CSC would purchase the BEA products from a "Government authorized source," which presumably meant a vendor that could provide the BEA products under an FSS contract. While there is no dispute that it

118. *Id.* at 3.

119. *Id.* at 5.

120. *Id.*

121. *CourtSmart Digital Sys., Inc.*, 2004 CPD ¶ 79, at 5.

122. *Id.* at 5 (citing *Symlicity Corp.*, Comp. Gen. B-291902, Apr. 29, 2003, 2003 CPD ¶ 89, at 4-5); *T-L-C Sys.*, Comp. Gen. B-285687.2, Sept. 29, 2000, 2000 CPD ¶ 166, at 4.

123. *KEI Pearson, Inc.*, Comp. Gen. B-294226.3, B-294226.4, Jan. 10, 2005, 2005 CPD ¶ 12, at 3-4.

124. *Id.* at 5.

was CSC's clear intention to give GSA the best possible price for the BEA products, CSC nevertheless had to do so in accordance with the rules applicable to FSS purchases and the terms of the RFQ, which meant that CSC had to provide the BEA products through a vendor holding an FSS contract, and GSA could only consider a quotation in the framework of the FSS for these products.<sup>125</sup>

These cases demonstrate that purchases of open market products must either follow the rules of full and open competition or be limited to a de minimis amount when included in task or delivery orders issued against GSA Schedule contracts. If a contractor does not have all of the required products or services approved on its GSA Schedule contract pricelist, it should consider a teaming arrangement with another GSA Schedule contractor who has obtained GSA approval to sell the remaining products or services through its GSA Schedule contract.<sup>126</sup>

#### D. Scope Issues

Challenges by competing contractors to the scope of orders awarded under GSA Schedule contracts are reviewed in the same manner in which they are reviewed for non-GSA contracts—GAO examines whether there is a material difference between the modification (or task or delivery order) and the original contract.<sup>127</sup> This test has evolved from the “cardinal change” doctrine as it has been applied in a number of cases protesting scope changes to ID/IQ contracts.<sup>128</sup>

125. *Id.* at 6.

126. The inclusion of open market items on a GSA schedule order poses hidden risks for the unwary contractor. GSA Schedule contracts contain no obligation that a contractor identify open market items on a quote or an invoice. The only related obligation in the contract is imposed on the ordering activity; the contract typically provides that an ordering activity may include open market items on a GSA Schedule order only if, among other things, it follows all applicable non-GSA acquisition regulations, makes a fair and reasonable price determination, clearly labels the open market items on its purchase order, and includes all required non-GSA contract clauses; *e.g.*, Gen. Servs. Admin., Solicitation No. FCIS-JB-980001-B (the GSA Schedule 70 IT Solicitation) (Refresh 21), at 111 (June 13, 2007). Notwithstanding this clear contractual responsibility, the authors strongly believe that it is a best practice for GSA Schedule contractors to ensure that their quoting (and perhaps even invoicing) systems clearly identify each line item as a GSA or open market item. The authors have represented numerous GSA Schedule contractors in investigations conducted by the GSA Office of Inspector General and/or the Civil Division of the U.S. Department of Justice in which the Government has alleged that the contractors misrepresented to ordering activities that items contained on a GSA Schedule contract order were GSA Schedule-covered items when, in fact, they were open market items. The Government has alleged in such cases that it was deprived of the opportunity to ensure that it was obtaining fair and reasonable pricing on all items covered by the orders at issue and, further, that such misrepresentations violated the Civil False Claims Act, 31 U.S.C. §§ 3729–3733. Although in many cases such allegations may seem spurious (especially given the fact that GSA Advantage! and/or published catalogs generally identify GSA Schedule contract items), this ounce of prevention well may be worth a pound of cure.

127. *Anteon Corp.*, Comp. Gen. B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51, at 4.

128. See generally Mark G. Jackson *et al.*, *Recognizing & Challenging Out-of-Scope Changes*, BRIEFING PAPERS, Dec. 2003, at 1; see also *Sprint Commc'ns Co.*, Comp. Gen. B-278407.2, Feb. 13, 1998, 98-1 CPD ¶ 60, at 5–6; *MCI Commc'ns Corp.*, Comp. Gen. B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90, at 7; *AT&T Commc'ns, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993).

In *Anteon Corp.*,<sup>129</sup> GAO sustained a protest challenging award of a delivery order under GSA's MAS "Smart Card" contract, finding that the deliverable required by the task order was outside the scope of the Smart Card contract.<sup>130</sup> The Smart Card contract provided for award of task or delivery orders for Smart Card solutions that, among other things, "support visual identification, physical access control and logical access control functions on a single card."<sup>131</sup> The Smart Card is defined to be a "Credit Size Card with an integrated chip" that is 3.370 inches wide, 2.125 inches high, and 0.030 inch thick.<sup>132</sup> The challenged task order required delivery of embedded IC chips to be inserted in U.S. passports issued by the State Department.<sup>133</sup> The task order sought delivery of various passport covers that included an electronic chip similar to that found in the Smart Cards currently delivered under the Smart Card contract.<sup>134</sup> GAO sustained the protest, finding that the physical deliverables sought under the task order did not reasonably fall within the scope of the Smart Card contract.<sup>135</sup> Furthermore, GAO found that potential offerors under the Smart Card contract that are able to manufacture the chip-embedded passport covers at issue might have wished to compete for a contract to do so and that they could not have reasonably foreseen the purchase of these items under the Smart Card contract.<sup>136</sup>

In contrast, in *Specialty Marine, Inc.*, GAO denied a protest of a task order issued under a GSA Schedule contract to repair two fleet ocean tugs.<sup>137</sup> The underlying GSA Schedule contract contained a broad statement of work for ship repair.<sup>138</sup> The protester challenged award of the task order for repairs to the tugs, arguing that the underlying GSA Schedule contract did not contemplate repairs on smaller vessels such as the tugs.<sup>139</sup> GAO denied the protest, finding that the broad language in the SOW allowed flexibility to include smaller vessels such as the tugs at issue in the task order.<sup>140</sup>

The lesson to be learned from *Anteon* and *Specialty Marine* is that the more broadly the scope of a particular GSA Schedule contract is written, the more broadly it may properly be used by contracting activities to acquire related products and services. If there are any questions as to the scope of the contemplated contract or an order under the contract, a prudent contractor should seek counsel or clarification.

129. *Anteon Corp.*, 2004 CPD ¶ 51.

130. *Id.* at 5.

131. *Id.* at 2.

132. *Id.*

133. *Id.* at 3.

134. *Id.*

135. *Id.* at 5.

136. *Id.*

137. *Specialty Marine, Inc.*, Comp. Gen. B-293871, B-293871.2, June 17, 2004, 2004 CPD ¶ 130.

138. *Id.* at 5.

139. *Id.* at 3.

140. *Id.* at 6.

## IV. BID PROTEST JURISDICTION

The Federal Acquisition Streamlining Act (FASA) of 1994 caused widespread changes to the way that the Government purchased products and services by establishing a preference for commercial item contracting.<sup>141</sup> Among other things, FASA formalized authority to award task and delivery orders under ID/IQ contracts.<sup>142</sup> FASA also includes a provision that prohibits protests of such task and delivery orders.<sup>143</sup> Only protest grounds alleging that the order increases the scope, period, or maximum value of the contract under which the order is issued are permitted.<sup>144</sup> When a protester alleges that an order is outside the scope of the underlying ID/IQ contract, GAO determines whether issuance of the task or delivery order in effect circumvents the general statutory requirement under CICA that agencies obtain full and open competition through the use of competitive procedures when procuring their requirements.<sup>145</sup>

Early GAO cases made clear that task and delivery orders under ID/IQ contracts are generally not protestable unless the award increases the scope, period, or maximum value of the contract.<sup>146</sup> *Electro Voice* and *Intrados* offered some relief to potential protesters by recognizing a case-made exception to the prohibition on bid protest jurisdiction when the award results in a downselection.<sup>147</sup> The Court of Federal Claims recognized FASA's prohibition against protests in connection with ID/IQ contracts.<sup>148</sup> However, as discussed in further detail below, it held that the general prohibition does not apply to task and delivery order contracts issued against GSA Schedule contracts.<sup>149</sup>

Given this background, a question arose as to whether this statutory and regulatory ban against protest jurisdiction should extend to GSA Schedule orders. GAO was the first to address this issue in *Severn Cos., Inc.*<sup>150</sup> Here, a contractor protested the cancellation of a delivery order issued against its GSA Schedule contract.<sup>151</sup> The Government challenged GAO's jurisdiction, arguing that FASA precluded it.<sup>152</sup> GAO answered this allegation in a footnote, finding:

we find no evidence that that provision is intended to preclude protests with respect to the placement of orders against GSA FSS contracts. In this regard, we note that

141. See Pub. L. No. 103-355, §§ 8001, 8104, 8203, 108 Stat. 3243, 3384-85, 3390-91, 3394-96.

142. 10 U.S.C. § 2304a (2000); see also 41 U.S.C. § 253h (2000).

143. 41 U.S.C. § 253j(d) (2000); *Anteon Corp.*, Comp. Gen. B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51, at 4-5.

144. 41 U.S.C. § 253j(d).

145. See 10 U.S.C. § 2304(a)(1)(A) (2000); *Anteon Corp.*, 2004 CPD ¶ 51, at 4; MCI Commc'ns Corp., Comp. Gen. B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90, at 7-8.

146. *Intrados Group*, Comp. Gen. B-280130, June 22, 1998, 98-1 CPD ¶ 168, at 2; *Electro Voice, Inc.*, Comp. Gen. B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23, at 4-5.

147. *Electro Voice, Inc.*, 98-1 CPD ¶ 23, at 4-5.

148. *Labat-Anderson Inc. v. United States*, 50 Fed. Cl. 99, 104 (2001).

149. *Id.* at 106.

150. Comp. Gen. B-275717, B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181.

151. *Id.* at 1.

152. *Id.* at 2 n.1.

the legislative history for the provisions of [FASA], which added the above restriction on protests as part of FASA's treatment of task and delivery order contracts, indicates that the order provisions were intended to encourage the use of multiple award order contracts, rather than single award order contracts. However, no such incentive was required with respect to the FSS, since it already afforded users a choice of multiple contractors. Further, subpart 16.5 of the Federal Acquisition Regulation (FAR), which includes the restriction on protests, supports the interpretation that the restriction was not intended to apply to the FSS since it treats FSS contracts as separate from other indefinite delivery contracts.<sup>153</sup>

Both GAO and the Court of Federal Claims reviewed FASA's prohibition against protests of task and delivery orders placed against GSA Schedule contracts in the case of *Labat-Anderson, Inc.*<sup>154</sup> Labat-Anderson protested to GAO the Immigration and Naturalization Service's (INS) award of a GSA Schedule BPA.<sup>155</sup> Here, the awardee asked GAO to reconsider its position, stated in *Severn Cos., Inc.*, that GAO has jurisdiction over protests when the solicitation anticipates awards of a task or delivery order against a GSA Schedule contract.<sup>156</sup> GAO declined, again in a footnote, holding: "we have reviewed our rationale for assuming jurisdiction over such protests, as set forth in *Severn Cos., Inc.*, and find no basis to change our position."<sup>157</sup>

Labat-Anderson then filed a motion for a preliminary injunction in the Court of Federal Claims, where it again alleged that FASA barred protests of task and delivery orders under GSA Schedule contracts.<sup>158</sup> The court rejected Labat-Anderson's position, citing two reasons:<sup>159</sup> first, because the award at issue was the award of a BPA, which is not a task or delivery order itself, but rather a vehicle against which task and delivery orders are placed.<sup>160</sup> Second, citing *Severn Cos., Inc.*, the court found that "there is no evidence that [253j(d)] is intended to preclude protests with respect to the placement of orders against GSA FSS contracts."<sup>161</sup> In *Group Seven Associates, LLC*,<sup>162</sup> the court considered a second challenge to its bid protest jurisdiction in a case that did not involve a BPA.<sup>163</sup> Here, the court followed its previous decision in *Labat-Anderson* but questioned its jurisdiction in a footnote, concluding that jurisdiction was doubtful, but it nevertheless assumed jurisdiction and decided the case on the merits.<sup>164</sup>

153. *Id.* (internal citations omitted).

154. See generally *Labat-Anderson, Inc.*, Comp. Gen. B-287081, B-287081.2, B-287081.3, Apr. 16, 2001, 2001 CPD ¶ 79, at 5 n.1; *Labat-Anderson Inc. v. United States*, 50 Fed. Cl. 99, 104-05 (2001).

155. *Labat-Anderson, Inc.*, 2001 CPD ¶ 79, at 1.

156. *Id.* at 5 n.1.

157. *Id.*

158. *Labat-Anderson Inc.*, 50 Fed. Cl. at 100, 104.

159. *Id.* at 104-05.

160. *Id.* at 105.

161. *Id.*

162. See generally *Group Seven Assocs., LLC v. United States*, 68 Fed. Cl. 28 (2005).

163. *Id.* at 31-32.

164. *Id.*

In 2006, the Court of Federal Claims again assumed jurisdiction in the face of a challenge to its subject matter jurisdiction to hear protests of task and delivery order awards under GSA Schedule contracts in *Idea International, Inc.*<sup>165</sup> Here, the court clarified that the limiting language for bid protest jurisdiction of FASA applies only to task and delivery orders entered into under 10 U.S.C. §§ 2304a and 2304b.<sup>166</sup> Since GSA Schedule contracts are not entered into under that authority, then the FASA restriction on bid protest jurisdiction is not applicable to task and delivery orders entered into under GSA Schedule contracts.

Finally, in September 2007, the Court of Federal Claims sought to resolve its prior inconsistencies with respect to bid protest jurisdiction.<sup>167</sup> In *Data Management Servs.*, the court explained, in a footnote, that its prior reservations with regard to its bid protest jurisdiction over GSA Schedule task and delivery order contracts had been unfounded.<sup>168</sup> Instead, the court clarified that FASA's restriction on bid protest jurisdiction for task and delivery order contracts was limited to a certain category of task and delivery order contracts that did not include those placed under GSA Schedule contracts.<sup>169</sup>

#### V. ACCOUNTABILITY IN GOVERNMENT CONTRACTING ACT OF 2007<sup>170</sup>

In early 2007, Sens. Susan M. Collins (R-Maine) and Joseph E. Lieberman (I-Conn.) introduced the Accountability in Government Contracting Act of 2007 (the Act).<sup>171</sup> The Act, if passed, would have significant changes on procurements under task and delivery orders, including those issued under GSA Schedule contracts. First, the Act proposes that as a general matter, all task or delivery orders issued under GSA Schedule contracts that are expected to exceed the simplified acquisition threshold must be made on a competitive basis.<sup>172</sup> To meet this competitive standard, agencies would be required to provide notice of the proposed procurement to "all contractors offering such property or services under the multiple award contract"<sup>173</sup> and to assure that all contractors responding to the notice have their offer fairly considered by the official making the purchase.<sup>174</sup> The Act provides for a waiver to this contractor notice requirement if as many contractors as practicable are notified and either (1) offers were received

165. *Idea Int'l, Inc. v. United States*, 74 Fed. Cl. 129 (2006).

166. *Id.* at 135.

167. *Data Mgmt. Servs. Joint Venture v. United States*, 78 Fed. Cl. 366, 371, n.4 (2007).

168. *Id.*

169. *Id.*

170. As of this writing, the Accountability in Government Contracting Act of 2007 had passed the Senate and has not yet been voted on by the House of Representatives.

171. S. 680, 110th Cong. (as passed by Senate, Nov. 7, 2007).

172. *Id.* § 201. The Act contains an exception to the competition requirement if the purchase is permitted by law or regulation and the contracting officer justifies the waiver in writing. *Id.*

173. *Id.* § 201(b)(2)(A) (emphasis added).

174. *Id.* § 201(b)(2)(B).

from three responsible bidders or (2) the contracting officer “determines in writing that no additional qualified contractors were able to be identified despite reasonable efforts to do so.”<sup>175</sup> In addition, the Act contains publication requirements for any task or delivery orders awarded on a sole source basis.<sup>176</sup>

In addition to the above requirements, the Act contains several other notable provisions, including a SOW requirement for any task or delivery order that is expected to exceed the maximum order threshold established in the GSA contract.<sup>177</sup> This provision also includes a debriefing requirement.<sup>178</sup> The Act proposes to limit bid protest jurisdiction for all task or delivery orders over a certain threshold, initially to be set at \$5 million.<sup>179</sup> The Act does not clarify whether this provision would apply to task and delivery orders issued against GSA Schedule contracts.<sup>180</sup> Finally, the Act prohibits the issuance of task or delivery orders for services to a single contractor if the order is expected to exceed \$100 million.<sup>181</sup>

## VI. CONCLUSION

Notwithstanding some well-publicized problems with the GSA Schedules program, it remains the primary source through which government agencies purchase commercial items, registering nearly \$36 billion in sales during government Fiscal Year 2007. GSA has addressed criticism that the program does not provide for adequate competition by revising its ordering procedures to require enhanced competition for large, complex services task orders. There is evidence that GSA Schedule ordering activities have followed the required competitive procedures with greater regularity in recent years. The Court of Federal Claims and GAO have removed the “incidental item” exception to competition for “open market items” and both take jurisdiction over protests involving the award of GSA Schedule task and delivery orders. However, notwithstanding these improvements to competition standards and increased accountability with respect to competition for GSA Schedule task and delivery order contracts, concerns remain that the GSA Schedule program does not provide adequate competition to ensure that the Government receives the pricing it should under this extremely large acquisition program. These continuing concerns may well result in additional legislative and/or regulatory activity to mandate enhanced competition requirements with respect to the award of GSA Schedule task and delivery order contracts. The proposed Accountability in Government Contracting Act of 2007 discussed above provides an example of what these additional competitive procedures might look like.

175. *Id.* § 201(b)(3)(A)–(B).

176. *Id.* § 201(c).

177. *Id.* § 202(a).

178. *Id.*

179. *Id.* § 203.

180. *Id.*

181. *Id.* § 206(a).

