GAO WARNS AGAINST USE OF FLEXIBLE ORDERING AGREEMENTS

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The Government Accountability Office ("GAO") recently found two agencies using a new, but unlawful approach to task and delivery orders, the Flexible Ordering Agreement ("FOA"). This is used on Indefinite Delivery, Indefinite Quantity ("IDIQ") contracts, such as a Government Wide Agency Contract ("GWAC"). The Federal Acquisition Regulation ("FAR") does not define or mention FOAs. However, the GAO has held them to be unlawful and warned agencies against their use in two recent decisions, *DLT Solutions, Inc.*, B-412237 et al, Jan. 11, 2016, 2016 WL 241468 and *Harris IT Serv. Corp.,* B-411699 et al, Oct. 2, 2015, 2015 CPD ¶ 293.

A Flexible Ordering Agreement is a solicitation that contemplates the issuance of a single, second-tier IDIQ instrument, under which the agency will then place subsequent task orders, without providing the GWAC contract holders with a fair opportunity to compete for those task orders. An FOA could be viewed as a "task order" against a task order. In *Harris IT Serv. Corp.,* the GAO held that this type of contract vehicle exceeded an agency's express authority to award task and delivery order type contracts pursuant to provisions of the Federal Acquisition and Streamlining Act of 1994, 41 U.S.C. §§4401–4106 ("FASA"). The GAO found that the FOA violated FASA because it fails to specify:

- The quantity to be acquired
- A delivery schedule
- The place of delivery or performance

FASA requires that every delivery ordered placed under an IDIQ contract include these three items. FAR 16.505(a)(7). The agency called the FOA a "delivery order," but once that delivery order is placed, all other GWAC contractors will no longer have a "fair opportunity" to compete for subsequent delivery orders, as required by FASA and FAR 16.504(c)(1)(i). Therefore, the FOA violates both FAR and the law. And it is abundantly clear that FOAs, or delivery orders against a delivery order, can seek performance that is totally different from what was originally competed by the agency.

In *Harris IT,* the GAO flatly ruled that FOA's were unlawful, without explicitly calling them Flexible Ordering Agreements. But more recently in *DLT Solutions,* where the agency explicitly called the delivery order it contemplated awarding a "FOA," the GAO noted that it had "recently found such contract vehicles [to] exceed an agency's express authority to award task and delivery order contracts" pursuant to FASA. However, because DLT did not challenge the type of contract *prior* to submission of proposals, any protest of the solicitation was untimely and GAO declined to rule on it. However, GAO stated very clearly "[a]lthough we do not address this issue, nothing in this decision should be construed as reflecting this Office's concurrence with the agency's use of a FOA" under a GWAC.

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