

COFC Protest Jurisdiction Over Schedule Task and Delivery Orders “Doubtful”

In a recent decision, the United States Court of Federal Claims (“COFC”) questioned whether the COFC has jurisdiction over protests of task and delivery orders placed under General Services Administration (“GSA”) multiple-award schedule (“MAS”) contracts, terming such jurisdiction “doubtful.” In *Group Seven Associates, LLC v. United States*, No. 05-867C (Oct. 13, 2005), the plaintiff Group Seven Associates, LLC (“Group Seven”), challenged the Department of Defense’s (“DoD”’s) award of a task order for acquisition support services to CACI, Inc. (“CACI”), under its GSA MAS contract. Group Seven claimed that the DoD had erred in considering CACI’s alternate pricing proposals for the transition period.

In response to Group Seven’s protest, the Government argued that COFC review was barred by 10 U.S.C. § 2304c (d) and 41 U.S.C. § 253j(d), which generally prohibit protests of the issuance or proposed issuance of task and delivery orders. Curiously, CACI – the intervenor – did not join in this argument. The statutory provisions in question are derived from the Federal Acquisition Streamlining Act of 1994 (“FASA”) and prohibit protests except where the protestor claims that the order or proposed order would increase the scope, period, or maximum value of the underlying contract.

In opposing the Government’s position, Group Seven argued that neither the FASA statutory provisions in question nor their implementing regulations in subpart 16.5 of the Federal Acquisition Regulation cover task orders issued under GSA MAS contracts. Group Seven cited powerful support for its position: in *Labat-Anderson Inc. v. United States*, 50 Fed. Cl. 99 (2001), the COFC had asserted jurisdiction over a protest against the award of a blanket purchase agreement (“BPA”) under a GSA MAS contract. The *Labat* court had concluded that 41 U.S.C. § 253j(d) did not bar the protest because the award involved a BPA rather than a task order. The court, however, had also agreed with the General Accounting Office’s decision in *Severn Companies, Inc.*, 97-1 Comp. Gen. 181 (1997), which had held that the task-order protest bar in 41 U.S.C. § 253j(d) was not intended to bar protests of the award of schedule orders. Finally, the *Labat* court had noted that the regulatory comments to subpart 16.5 state that the statutory bar does not apply to MAS contracts.

The Court rejected Group Seven’s arguments, noting that the protested acquisition did not involve the award of a schedule BPA and that “the first rationale of *Labat*, that the order is merely a vehicle against which further task orders can be placed, is inapplicable.” The Court found the second rationale of *Labat* – that the FASA does not apply to GSA MAS contracts – “more problematic.” Noting that the analysis in

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Labat is “less than compelling,” the Court observed that the statutory language in the FASA protest bar does not suggest any exceptions. In short, he concluded, jurisdiction is “doubtful.” Given the *Labat* decision and CACI’s reluctance to rely on it, however, the Court nonetheless assumed that the COFC had jurisdiction and proceeded to the merits of the case, dismissing the protest. (Since parties cannot confer jurisdiction on the COFC, a court of limited jurisdiction, the Court’s assumption of jurisdiction raises interesting questions.)

Group Seven could be excused if it was surprised by the Court’s jurisdictional comments. No previous COFC or GAO decision has suggested that the FASA protest bar applies to the issuance or proposed issuance of task or delivery orders under GSA MAS contracts. MAS contractors should watch for further jurisdictional developments. More and more high dollar service work (especially in the Information Technology area) is being obtained via the schedules. GAO not only takes protests of awards of orders and BPAs under the schedules, but in dozens of cases has held the government to whatever competitive procedures it has utilized to place the work, as well as to basic standards of fairness and reasonableness. If the dicta in Group Seven were correct, neither GAO nor COFC would have jurisdiction to hear such protests, just as neither tribunal today has jurisdiction to hear protests of task or delivery orders under multiple award IDIQ contracts (except for issues relating to scope).

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