THE GOVERNMENT CONTRACTOR®

THOMSON WEST

Information and Analysis on Legal Aspects of Procurement

Vol. 47, No. 46 December 7, 2005

Focus

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FEATURE COMMENT: *Group Seven Assocs., LLC* Calls Into Question COFC Jurisdiction Over Downselect Competitions Among GSA FSS Contract Holders

In *Group Seven Assocs., LLC v. U.S.*, 68 Fed. Cl. 28 (2005), the U.S. Court of Federal Claims noted that it was "doubtful" that it had subject-matter jurisdiction over a bid protest challenging the award of a task order pursuant to a competition limited to General Services Administration Federal Supply Schedule contract holders. The *Group Seven* court based its reasoning on a provision in the Federal Acquisition Streamlining Act prohibiting contractors from protesting awards under task or delivery order contracts. Before this decision, however, it was reasonably settled under *Labat-Anderson, Inc. v. U.S.*, 50 Fed. Cl. 99 (2001), that the COFC would entertain such protests. Since agencies frequently limit competitions to GSA FSS contract holders, whether such procurements can be protested at the COFC is significant for the Court's protest jurisdiction.

This FEATURE COMMENT analyzes the opposing views taken by the *Group Seven* and *Labat-Anderson* courts and concludes that, although the scope of FASA's protest limitation is open to varying interpretations, legal and policy reasons tip the balance in favor of a narrow application.

FASA's Protest Bar—Congress enacted FASA in 1994 to simplify and streamline the federal procurement process. One way the Act does that is by permitting agencies to award multiple award task order contracts featuring continuous competition among contract holders who are granted "fair opportunity" to compete for orders, but are limited in their ability to challenge the award of individual task or delivery orders:

> A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.

10 USCA § 2304c(d) and 41 USCA § 253j(d). It was envisioned that such protests would be filed not by the contractors holding multiple award task order contracts, but by contractors *outside* of this limited group concerned that the contracts were being used improperly to acquire supplies or services not contemplated at the time the multiple award contracts were put in place. In lieu of protests of individual orders, FASA uses an ombudsman to review grievances and ensure that "all contractors are afforded a fair opportunity to be considered for task ... orders." 10 USCA § 2304c(e) and 41 USCA § 253j(e).

Although FASA does bar most protest grounds challenging certain types of task and delivery orders, it does not expressly address whether that prohibition extends to task or delivery orders awarded under FSS contracts that predate the "continuous competition" concept associated with FASA's multiple award task order contract scheme. Until the *Group Seven* decision, it seemed reasonably well settled at both the COFC and the Government Accountability Office that FASA's protest bar does not apply to competitions limited to FSS contract holders. See, e.g., *Severn Cos., Inc.*, Comp. Gen. Dec. B-275717, 97-1 CPD ¶ 181 (concluding that FASA did not apply to GSA FSS contracts); see also *Electro-Voice,, Inc.*, Comp. Gen. Dec. B-278319, 98-1 CPD ¶ 23 (concluding that FASA did not extend to protests challenging "downselections").

***Group Seven*'s Analysis of *Labat-Anderson* and the FASA Protest Bar**—*Group Seven* involved a post-award bid protest filed after the Defense Department awarded a fixed-price task order to CACI Inc. for acquisition support services. In its request for proposals, DOD informed potential

offerors that it intended to "award a single Firm Fixed-Price Task Order" covering a one-year base period, with up to four option years. Just as in the *Labat-Anderson* case, DOD limited the competition to FSS contract holders.

Both CACI and Group Seven submitted proposals. CACI provided DOD with three pricing options for transition services. This portion of the project, and, therefore, CACI's total proposed price, varied, depending on the level of effort DOD wanted. After completing its evaluation, DOD assigned CACI's proposal higher confidence ratings on the management approach and past performance evaluation criteria than those awarded to Group Seven. DOD also selected a transition services option that, in effect, made CACI the lowest-priced offeror for the five-year performance period. Consequently, DOD determined that CACI offered the best value and made award on that basis.

After its agency-level protest was denied, Group Seven sought relief at the COFC, primarily challenging DOD's decision to accept what it characterized as "alternate pricing" proposals. The Government raised, as a jurisdictional argument, the FASA protest bar (the intervenor did not join the Government on that point). In response, Group Seven relied on *Labat-Anderson*.

Labat-Anderson involved the Immigration and Naturalization Service's award of a five-year blanket purchase agreement to operate immigration service centers for application and petition processing in California, Nebraska, Texas and Vermont. The INS request for quotations estimated the BPA would be worth approximately $344 million over a five-year period. Importantly, in its RFQ, the INS explained its intent to award a single BPA to a current FSS contract holder. Although any FSS contractor could compete for the BPA, only one would prevail, and that company would face no further competition for five years. Labat-Anderson challenged the INS' award to another company, first at GAO, then at the COFC.

Among the arguments raised by the awardee in both fora was the contention that FASA's protest prohibition divested the court of jurisdiction. GAO rejected the argument, relying on the *Severn* line of decisions. See *Labat-Anderson, Inc.*, Comp. Gen. Dec. B-287081, 2001 CPD ¶ 79 (stating that GAO "reviewed our rationale for assuming jurisdiction over [protests under GSA FSS contracts] and [found] no basis to change our position"). The COFC rejected the jurisdictional argument for two reasons.

First, because the BPA was "not a task order itself, but rather the vehicle against which task orders will be placed," the plain language of FASA led to the conclusion that its protest prohibition was not applicable. 50 Fed. Cl. at 104-105. Second, the *Labat-Anderson* court explained that FASA's protest prohibition is implemented in Federal Acquisition Regulation subpt. 16.5, but FSS contracts are awarded under the authority of FAR pt. 8 and governed by pt. 38. Id. FAR subpt. 16.5 expressly states that it places no limits on GSA's contracting authority and that pts. 8 and 38 take precedence. Finally, the court looked to the regulatory history of subpt. 16.5, noting that " '[c]ontracts subject to Part 38 were exempted from coverage because [FASA] specifically exempted the GSA Federal Supply Schedule Program.' " Id. (quoting 61 Fed. Reg. 39201, 39202 (July 26, 1996)). Thus, the plain language of the FAR, as well as its regulatory history, led the *Labat-Anderson* court to conclude that the FASA protest bar did not apply.

The *Group Seven* court disagreed with both prongs of the *Labat-Anderson* analysis. Because Group Seven's protest involved a task order rather than a BPA, the *Group Seven* court found the first part factually distinguishable and, therefore, inapplicable. As for the second prong, the *Group Seven* court stated that *Labat-Anderson* was "problematic" and, although an analysis that one could follow, "less than compelling." 68 Fed. Cl. at 32. Apparently applying a "plain meaning" analysis, the *Group Seven* court concluded that because the language of FASA's protest bar "does not suggest any exceptions ... jurisdiction is doubtful." Id.

Legal and Policy Reasons Supporting a Narrow Interpretation of FASA's Protest Bar—In *Group Seven*, the COFC relied heavily on the language of FASA's protest bar, which the Court noted "did not suggest any exceptions." Although FASA itself may not have any express "exceptions," legislative intent and the regulatory regime pre-dating its enactment are significant factors to consider. FASA encouraged the use of multiple award contracts outside the GSA arena as a way to promote continuing competition after award. Indeed, Professor Steven Kelman, then-administrator of the Office of Federal Procurement Policy and a principal advocate of FASA, stated that "multiple award task order con-

tracts are one of the most important innovations to come out of FASA because they allow the benefits of streamlining *and ongoing competition*." Federal Contracts Daily (Aug. 13, 1997) (emphasis added) and 39 GC ¶ 411. Thus, the theory behind this approach is that, by awarding multiple contracts for the same service, an agency can sustain some level of competition—albeit less than full-blown competition—*after award*. The protest exemption was added so agencies could run "mini-competitions" without the delays associated with protests, based on the theory that if contractors did not receive one order, they would soon have the opportunity to compete for numerous future task orders placed under this type of contract. This intent is thwarted by award of a five-year, high-value, sole-source BPA or task order.

In any case, when this multiple award contract innovation ultimately was incorporated into the FAR, it was *not* codified in FAR pt. 8 and 38, which govern GSA schedule contracting, but in an entirely separate subpart addressing this new preference for multiple award contracting. See FAR 16.500 ("this subpart ... establishes a preference for making multiple awards of indefinite-quantity contracts"). Pt. 8 contains its own competition and evaluation procedures for BPA and task order awards under FSS contracts that differ significantly from the "fair consideration" ordering procedures set forth in subpt. 16.5. Compare FAR 8.405-1, 2 and 3 with 16.505. Importantly, FAR subpt. 16.5 is where FASA's task and delivery order contract protest prohibition resides. See FAR 16.505(a)(8). Moreover, as noted by the *Labat-Anderson* court, the regulatory comments accompanying the final rule implementing subpt. 16.5 state that FASA "created a multiple award preference for indefinite-quantity contracts .... *Contracts subject to Part 38 were exempted from the coverage because [FASA] specifically exempted GSA's Federal Supply Schedule Program*." 61 Fed. Reg. 39201, 39202 (emphasis added).

The use of separate regulatory regimes is consistent with GSA's FSS authority pre-dating FASA. To import provisions from one regulatory scheme, i.e., the FASA protest bar, into another, appears inconsistent with the intent of the FAR Council, which reasonably interpreted FASA as not affecting FSS contracts.

It is also noteworthy that both the *Group Seven* and *Labat-Anderson* competitions involved more than the baseline ordering procedures set forth in the FAR. Both the COFC and GAO have recognized that agencies are permitted to "borrow" procedures more commonly seen in competitions governed by FAR pt. 15. When an agency opts to do so, both the COFC and GAO will review protests challenging the implementation of such procedures. See, e.g., *Ellsworth Assocs., Inc. v. U.S.,* 45 Fed. Cl. 388 (1999) (noting that procedures "more comprehensive" than those in pt. 8 are subject to review); see also *COMARK Fed. Sys.*, Comp. Gen. Dec. B-278343, 98-1 CPD ¶ 34 (same).

Conclusion—There are several legal and policy reasons that support a narrow interpretation of FASA. First, when the Government enters into a long-term agreement with a single GSA FSS contractor, it is making a downselection that eliminates future competition. That is quite a different situation from one in which, for example, the Government is regularly placing orders for the same goods and services, and a contractor can lose one week or month, but win the next. In the *Labat-Anderson* case, the awardee received an exclusive, five-year arrangement worth an estimated $344 million. In the *Group Seven* case, CACI received a five-year, exclusive right to provide acquisition support services to DOD. To apply FASA's protest bar where there is one winner and many losers eliminates sustained post-award competition, which is the point of the bar in the first place. Likewise, agencies would have every reason to enter into massive, long-term, exclusive, "protest-proof" BPAs and task orders whenever possible and without regard for whether they are the best contractual vehicles.

Second, *Group Seven* and *Labat-Anderson* involve acquisition conducted under FAR pts. 8 and 38, not subpt. 16.5, which contains the FASA protest bar. The regulatory history for subpt. 16.5 expressly states that it was not intended to extend to the FSS program.

Third, subpt. 16.5 is structured so that the FASA protest bar operates in conjunction with basic "fair opportunity" ordering procedures. Arguably, even under subpt. 16.5, if the Government went beyond the "fair opportunity" ordering procedures by, for example, tacking on FAR pt. 15-like competitive procedures, the protest bar would not apply. Not only did *Group Seven* and *Labat-Anderson* involve acquisitions under pts. 8 and 38, as opposed to subpt. 16.5, both cases involved competitive procedures exceeding the applicable basic-ordering guidelines. To apply FASA when the Government elects to use FAR pt. 15-like competitive procedures would conflict with the exist-

ing regulatory regime linking the protest bar to a basic "fair opportunity to compete."

Although the issue is open to interpretation, applying the FASA protest bar narrowly makes sense from both a legal and policy point of view.

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