

## Recommendation 76: Revise the fair opportunity procedures and require their use in task and delivery order competitions.

### Problem

When competing orders under MA IDIQ contracts, contracting personnel frequently choose complex source selection procedures derived from FAR 15.3 instead of the streamlined fair opportunity procedures in FAR 16.505(b) intended for these types of procurements.<sup>1</sup> Voluntary use of source selection procedures results in additional, unnecessary steps in the solicitation, proposal, and evaluation processes that create additional workload for both government and industry. Forgoing the opportunity to use the more streamlined fair opportunity procedures also extends the timeline to award.<sup>2</sup>

### Background

The concept of fair opportunity first appeared in the Federal Acquisition Streamlining Act of 1994 (FASA). It was considered a necessary and common sense process to accompany the proliferation of MA IDIQ contracts. The logic was that contractors that already participated in a full FAR 15.3 competition to get onto the vehicle should not be subjected to the same process to compete for orders. Streamlined ordering procedures would shorten award timeframes, benefitting both government and its MA IDIQ contract holders. The Office of Federal Procurement Policy (OFPP) explained in 1997 “Congress recognized that without streamlined order placement, the quality benefits and cost savings made possible by continuous competition might be outweighed by excessive expenditures of time and administrative resources.”<sup>3</sup>

As incorporated into the FAR, the language in Subpart 16.505(b)(1)(ii) describes the latitude provided to contracting officers:

*The contracting officer may exercise broad discretion in developing appropriate order placement procedures. The contracting officer should keep submission requirements to a minimum. Contracting officers may use streamlined procedures, including oral presentations. ... The competition requirements in Part 6 and the policies in Subpart 15.3 do not apply to the ordering process.*

To assist with adoption of these streamlined procedures, OFPP issued best practices guidance in 1999.<sup>4</sup> Specific examples of streamlining available when using FAR 16.5 procedures include the following:

- No formal source selection plan or evaluation team structure is required. As stated in the FAR, “Formal evaluation plans or scoring of quotes or offers are not required.” For orders exceeding

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<sup>1</sup> DoD, *Source Selection Procedures: Defense Federal Acquisition Regulation Supplement, Procedures, Guidance and Information, Subpart 215.3--Source Selection*, March 31, 2016, accessed October 23, 2018, <https://www.acq.osd.mil/dpap/policy/policyvault/USA004370-14-DPAP.pdf>.

<sup>2</sup> ASI Government Advisory, *Streamlining Task and Delivery Order Solicitations under MA/IDIQ Contracts*, May 2016, accessed October 23, 2018, <https://interact.gsa.gov/sites/default/files/ASI%20Advisory%20on%20Streamlining%20Final%206.9.2016.pdf>.

<sup>3</sup> “Best Practices for Multiple Award Task and Delivery Order Contracting,” Office of Management and Budget, July 1997, Chapter 4—Ordering Procedures, accessed October 23, 2018, <https://www.gsa.gov/cdnstatic/BestPracticesMultipleAward.pdf>.

<sup>4</sup> Ibid.

\$5.5 million made on a best value basis, however, contracting officers are required to provide “a written statement documenting the basis for award and the relative importance of quality and price or cost factors.”

- The only mandatory evaluation factor is cost/price. There are no required rating tables or definitions, which provided the contracting officer with flexibility to use simplified evaluation schemes.
- No requirement exists to establish a competitive range or enter into *discussions* with all offerors. The contracting officer may decide to initiate *exchanges* (the fair opportunity equivalent of *discussions*) with any number of offerors or with only one.
- Immediate comparison of proposals is permitted with no need to independently evaluate prior to comparative analysis.
- Use of oral presentations and/or demonstrations is allowed. Also available in FAR 15.3 procedures, these types of activities can play a prominent role as the main or even sole technical evaluation technique in FAR 16.5 competitions.
- No requirement exists to quantify tradeoffs that lead to the selection decision. However, “The contracting officer shall document in the contract file the rationale for placement and price of each order, including the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision.”

Streamlined ordering procedures for Federal Supply Schedules (FSS) are available in FAR 8.405. GSA publishes various guidance documents encouraging proper use of these streamlined procedures, including one titled *Think Simplified (Not FAR Part 15)*.<sup>5</sup> When DoD competes orders on FSS contracts, however, it sometimes uses FAR 15.3 procedures.

Despite all the advantages of FAR 16.5 procedures and the substantial number of years they have been available, DoD has shown a general reluctance toward their adoption and use.

## Discussion

The *broad discretion* afforded to contracting officers in FAR 16.5 goes hand-in-hand with FAR 1.102 which states “absence of direction should be interpreted as permitting the Team to innovate and use sound business judgment,” and yet use of the streamlined procedures described in FAR 16.5 has been inconsistent at best, leading many in the acquisition community to comment on the matter. An article in the Nash & Cibinic Report titled *Simplified Acquisition Procedures: Why Can’t We Keep Them Simple?* states the following:<sup>6</sup>

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<sup>5</sup> GSA, *Handout F: Think Simplified (Not FAR Part 15)*, 22, November 12, 2013, accessed October 23, 2018, <https://interact.gsa.gov/sites/default/files/handouts%20a%20through%20h%2011.29.14.pdf>.

<sup>6</sup> Vernon J. Edwards and Ralph C. Nash, *THE FAR: Does It Have Contractual Force And Effect?*, 31 Nash & Cibinic Rep. NL ¶ 10, February 2017, accessed October 23, 2018, <http://www.wifcon.com/analy/thefardoesithave.pdf>.

*One of the most remarkable and disappointing phenomena of Government contracting is the unwillingness or inability of many contracting officers to take advantage of the streamlining and labor-saving contract formation procedures that became available during the acquisition reform era of the 1990's. COs needlessly resort to Federal Acquisition Regulation Part 15 solicitation, offer, and award procedures when making simplified acquisitions, when competing task orders under multiple award service contracts, and even when placing orders under General Services Administration schedules.*

Numerous presentations at the National Contract Management Association (NCMA) World Congress from 2014 to 2018 expressed a similar sentiment, including one titled *Fair Opportunity—Why Are We Making This So Hard?*<sup>7</sup>

Some DoD organizations have developed guides to encourage and assist contracting professionals in the use of fair opportunity procedures. For example, in August 2017 the Air Force Materiel Command published *Guiding Principles for Fair Opportunity Selection Under Federal Acquisition Regulation (FAR) 16.505(b)(1)*. The introduction to the guide summarizes the issue as follows:

*Many acquisition teams do not capitalize on the flexibility and potential time savings associated with the less formal FAR 16.505 competition strategies because the FAR and its supplements do not contain more specific guidance or information on how COs can utilize their “broad discretion.” As a result, the advantages available through competing an action under a MAC IDIQ are underutilized as many teams spend valuable time, money and resources using formal FAR 15.3 source selection procedures because there is so much regulation, training and sample documentation available. Simply put, the current acquisition community is extremely conversant with FAR 15.3 source selection procedures, so teams revert to using formal FAR 15.3 competition procedures rather than exploring and utilizing the streamlining opportunities afforded by FAR 16.505.*

The Coalition for Government Procurement found “it takes a contracting officer 145 days less to place an order under an MA IDIQ, than to establish a new contract. That faster ordering time saves the government an estimated \$37,000 per contracting officer per order. This estimate does not account for the savings that result from customers receiving their products and services more quickly.”<sup>8</sup> Frequent use of full source selection procedures when fair opportunity procedures could—or should—be used, raises a number of questions: *How much time and money is being wasted in this manner across the department on an annual basis? To what degree is the department needlessly delaying capabilities to warfighters and other end users, and what are the second-order effects of these inefficiencies?*

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<sup>7</sup> Nick Tsiopanas and Jessica Dobbeleare, *Fair Opportunity – Why Are We Making this So Hard?*, presentation to the NCMA World Congress 2014, July 29, 2014, accessed October 23, 2018, [https://www.ncmahq.org/docs/default-source/default-document-library/pdfs/f02---fair-opportunity---why-are-we-making-this-so-hard.pdf?sfvrsn=5932202b\\_2](https://www.ncmahq.org/docs/default-source/default-document-library/pdfs/f02---fair-opportunity---why-are-we-making-this-so-hard.pdf?sfvrsn=5932202b_2).

<sup>8</sup> “Multiple Award IDIQ Contracts: Essential Tools in the Acquisition Toolbox,” The Coalition for Government Procurement, September 28, 2017, accessed October 23, 2018, <http://thecgp.org/multiple-award-idiq-contracts-essential-tools-in-the-acquisition-toolbox.html>.

An ASI Government advisory from 2016 found the following:<sup>9</sup>

*Awarding a new standalone contract took between 405 and 495 hours, while awarding a task order took between 119 and 168 hours. A comparison of acquisition strategies revealed that issuing a standalone contract versus awarding an order under a GWAC for a transaction exceeding \$12.5 million:*

*Increased the total amount of work by 121 percent*

*Increased the amount of work done by experts from 14 percent to 80 percent*

*Reduced the amount of work done by journeymen and entry levels from 86 percent to 20 percent*

*Required a GS-14/15 supervisor as expert for approximately .92 staff years versus .07 staff years, or a non-supervisory expert for .36 staff years versus .03 staff years.*

The implications of these analyses are clear: Widespread and more consistent use of FAR 16.5 procedures would benefit DoD by reducing cycle times for task order awards and by freeing senior and expert personnel to focus on more strategic and difficult procurements.

Some have observed the tendency to use FAR 15.3 is due to the workforce's comfort with rules and procedures that are spelled out in detail. By contrast, the FAR does not provide a formal definition of what constitutes providing MA IDIQ awardees *fair opportunity* for order competitions. The flexibility of the FAR 16.5 process—viewed by some as a strength—can actually be a weakness because it requires the contracting team to develop details. That is, it requires some creativity and possibly innovation as opposed to just following predetermined steps. FAR 16.5 specifically tells contracting officers they have broad discretion in this process; yet it appears that discretion is unsettling in a culture that values compliance and checklists.

Current DoD source selection procedures state the FAR 15.3 procedures should be considered for use on MA IDIQ orders of more than \$10 million. In DoD contracting's compliance oriented culture, the word *considered* is often interpreted as *should* or even *shall*. Presumably, the rationale for recommending consideration of source selection procedures at \$10 million was based on the then-current GAO protest threshold. That threshold has since been increased to \$25 million, but dollar value alone does not accurately indicate risk, and when properly planned and executed, FAR 16.5 procedures do not increase risk of protest.

Contracting officers' apprehension could stem in part from GAO's consistently held view that if a FAR 16.5 competition uses FAR 15.3 terminology and/or partial procedures, then GAO will apply the standards of a FAR 15.3 negotiated procurement to bid protests.<sup>10</sup> The same is true for orders against FSS. A protest by Finlen Complex, Inc. of an Army award for procurement of meals, lodging, and transportation was sustained by GAO because the "agency's use of a negotiated procurement approach, rather than a simple Federal Supply Schedule purchase, triggered [the] requirement to

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<sup>9</sup> ASI Government Advisory, *Streamlining Task and Delivery Order Solicitations under MA/IDIQ Contracts*, May 2016, accessed October 23, 2018, <https://interact.gsa.gov/sites/default/files/ASI%20Advisory%20on%20Streamlining%20Final%2006.9.2016.pdf>.

<sup>10</sup> GAO, *Decision, Matter of: Abacus Technology Corporation; SMS Data Products Group, Inc., B-413421*, October 28, 2016, accessed October 23, 2018, <https://www.gao.gov/assets/690/680987.pdf>.

provide for a fair and equitable competition.” GAO went on to say “Despite the ‘simplified’ label, this procurement is very similar to any other negotiated acquisition conducted under the rules set forth in FAR part 15.”<sup>11</sup> In this and many similar bid protest cases, GAO has repeatedly invoked the stance that it looks to the substance of an agency’s actions, rather than the form.<sup>12</sup> Simply stating a solicitation uses FAR 16.5 procedures is not sufficient. The entire solicitation and associated process must follow those procedures and carefully avoid using FAR 15.3 terminology. Table 7-5 provides a comparison of FAR 15.3 and FAR 16.5 terminology. These different lexicons are a critical component to establishing which procedures are being used.

**Table 7-5. FAR 15.3 and 16.5 Terminology Comparison**

FAR 15.3 Terms	FAR 16.5 Terms
Offeror	Contractor
Request for Proposals (RFP)	Request for Task Order Proposals (RFTOP) Fair Opportunity Proposals Request (FOPR)
Source Selection	Task Order Evaluation Evaluation and Selection
Source Selection Plan	Proposal Evaluation Plan Fair Opportunity Selection Plan
Source Selection Authority	Task Order Determining Official Fair Opportunity Decision Authority
Discussions	Interchanges Exchanges
Proposal	Proposal Quote Response

Other nuances can come into play when using FAR 16.5 procedures. One such nuance is whether oral presentations constitute *discussions*. In a bid protest by Sapient Government Services, Inc., the company argued that the Department of Homeland Security (DHS) had initiated discussions by conducting a dialogue about Sapient’s proposed solution during a task order competition oral presentation. GAO denied the protest, stating DHS properly followed FAR 16.5 procedures because the exchanges that occurred during the oral presentation pertained only to the oral presentation and not to Sapient’s earlier submitted written proposal.<sup>13</sup> It is understandable how nuances like these could give contracting officers pause when deciding which set of procedures to use. With appropriate planning and understanding, the streamlined procedures can be used with confidence while saving valuable time in the process. The default procedures for MA IDIQ order competitions should be based on the streamlining available in FAR 16.5; however, interviews, publications, and conference presentations indicate FAR 15.3 procedures are frequently used instead. Many DoD contracting offices do not have

<sup>11</sup> “Finlen Complex, Inc., B-288280,” GAO, October 10, 2001, accessed October 23, 2018, <https://www.gao.gov/products/407353>.

<sup>12</sup> GAO, *Decision, Matter of: CourtSmart Digital Systems, Inc., B-292995.2*, February 13, 2004, accessed October 23, 2018, <https://www.gao.gov/assets/380/371312.pdf>.

<sup>13</sup> GAO, *Decision, Matter of: Sapient Government Services, Inc., B-412163.2*, January 4, 2016, 6-7, accessed October 23, 2018, <https://www.gao.gov/assets/680/674778.pdf>.

guidance or procedures for fair opportunity, so their personnel continue to use what they know and have been trained on—full FAR 15.3 source selection procedures.

## Conclusions

When properly designed and followed, FAR 16.5 procedures save time and money for DoD and industry partners, as well as get needed capabilities to users faster. These procedures also encourage innovation in the contracting process by providing substantial flexibility to contracting officers and explicitly authorizing broad discretion in the process.

DoD must increase use of FAR 16.5 procedures by providing practitioners with policy, guidance, and best practices to give them the knowledge, support, and confidence needed to benefit from this important acquisition tool.

## Implementation

### **Legislative Branch**

- Revise 10 U.S.C. § 2304c(d)(1–5) to more clearly specify what constitutes streamlined ordering procedures (e.g., subfactors are not required), and to increase the threshold for use of these procedures from \$5.5 million to \$7 million, consistent with the streamlined procedures for acquiring commercial products and services addressed in the Section 809 Panel *Volume 2 Report*, Recommendation 28.

### **Executive Branch**

- Revise FAR 16.505(b)(1)(iv) to more clearly specify what constitutes streamlined ordering procedures (e.g., subfactors are not required), and to increase the threshold for use of these procedures from \$5.5 million to \$7 million, consistent with the streamlined procedures for acquiring commercial products and services addressed in the Section 809 Panel *Volume 2 Report*, Recommendation 28.
- Revise FAR 16.505(b)(1)(ii) to require contracting officers to use streamlined procedures when placing orders under multiple-award contracts. Require contracting officers to obtain approval to use the complex source selection policies and procedures in FAR Part 15.3 when placing orders under multiple-award contracts.
- Remove from FAR 16.505(b)(1)(ii) the statement “Include the procedures in the solicitation and the contract.” Different orders under the same contract may benefit from different procedures. Establishing a single set of procedures up-front and years before specific order requirements are known could conflict with the intent to provide broad discretion in developing fair opportunity procedures.
- Develop a Fair Opportunity desk guide to assist contracting professionals in confidently using proven streamlined procedures, and encourage development and use of innovative techniques to increase the quality of the evaluation and selection process while further reducing cycle time. This desk guide would not be prescriptive and instead would include examples of successful procedures, case studies, and best practices.

- Remove the following statement from the DoD Source Selection Procedures: “Agencies shall consider the use of these procedures for orders under multiple award (Fair Opportunity) greater than \$10 million.”<sup>14</sup>

***Implications for Other Agencies***

- Although there are no explicit cross-agency implications for this recommendation, other agencies could benefit from using the fair opportunity procedures developed by DoD.

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<sup>14</sup> DoD, *Source Selection Procedures: Defense Federal Acquisition Regulation Supplement, Procedures, Guidance and Information, Subpart 215.3--Source Selection*, March 31, 2016, accessed October 23, 2018, <https://www.acq.osd.mil/dpap/policy/policyvault/USA004370-14-DPAP.pdf>.