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Finessing CICA: the Open-Ended Support Contract Ploy

[A Government Contracting Alert from the Office of Jon W. van Horne.][1]

CICA, the Competition in Contracting Act (41 USC 253 et seq.), requires the government to obtain supplies and services through "full and open competition through the use of competitive procedures."[2] There are, of course, a number of exceptions to this requirement and sometimes it seems to me that federal procurement officials put more effort into avoiding competition than they put into running an appropriate competition. Agencies appear to have developed a number of ploys to avoid competition involving task order IDIQ contracts, buzzwords like "standardization," and (today's entry) the open-ended support contract.

Here's how it works. The agency finds an IDIQ or schedule contract, a BPA or some similar contractual ordering vehicle (in this case a Government Wide Acquisition Contract (GWAC)) and issue a task order for "support" to a program. Then, with or without the help of the support contractor, the agency decides what the program needs, say IT services or software tools. The support contractor is then directed to go out and buy whatever is needed. Since the purchase is a subcontract, most federal procurement regulations (specifically the requirement for "full and open competition") do not apply, making it much easier for agency personnel, who activity participate in the selection process, to get what they want without having to worry about messy things like solicitations, source selection evaluations and bid protests. Or so the theory goes.

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This was apparently the plan in a case recently decided the by Court of Appeals for the Federal Circuit. (Distributed Solutions, Inc., and STR, L.L.C., v. United States, No. 2007-5145, August 28, 2008) This case involves a procurement of software for the Joint Acquisition and Assistance Management System program (JAAMS), a joint United States Agency for International Development (USAID) and Department of State (DOS) program to develop a common computer platform between the two agencies. In November 2003, a task order was issued to SRA International, Inc. (SRA), under GSA's Millennia GWAC to provide "technical services and support for information technology purposes." In June 2005, the agency, assisted by SRA, issued a Request for Information (the June RFI) soliciting sources for "commercial off-the-shelf (COTS) Acquisition and Assistance (A&A) solutions for JAAMS." After reviewing the June RFI responses, the agency announced that it had decided "to pursue alternative courses of action." The agency then decided to task SRA with selecting the software vendors, which SRA did first by issuing an RFI of its own (the August RFI) and then making a selection. Two disappointed software vendors unsuccessfully protested to GAO and subsequently to the Court of Federal Claims. Both GAO and the Court treated the protests as nothing more than subcontractor protests, which neither forum will hear.

The Court found that the contractors had standing (i) because they responded to the June RFI, demonstrating that they were potential offerors, and (ii) because they had a direct economic interest, having been deprived of the opportunity to compete to provide the software solution, a contract that could have been worth $10 million. The Court also found that the contractors had alleged a number of non-frivolous statutory and regulatory violations.

This left the key question, whether the complaint alleged statutory and regulatory violations "in connection with a procurement or a proposed procurement." The Court of Federal Claims jurisdictional statute for bid protests, 28 USC 1491(b), includes three bases for jurisdiction: (I) objections to a solicitation; (ii) objections to an award; and (iii) "any alleged violation of statute

or regulation in connection with a procurement or a proposed procurement." The contractors relied on the third basis for bid protest jurisdiction.

The Court, citing RAMCOR Services Group, Inc. v. United States, 185 F.3d 1286, 1289 (Fed. Cir. 1999), noted that the operative phrase "in connection with" is very sweeping in scope. Acknowledging that the bid protest jurisdictional statute (28 USC 1491(b)) does not define either "procurement" or "proposed procurement," the Court adopted the statutory definition of "procurement" found in the OFPP Act at 41 U.S.C. § 403(2). Under this definition, "procurement" includes "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services." Although the Court did not comment on this, the statutory definition from the OFPP Act has been adopted by the Federal Acquisition Regulation. See 48 CFR 2.101.