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Fine-Tuning Acquisition Reform's Favorite Procurement Vehicle, the Indefinite Delivery Contract

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I. Introduction

During the past two decades, acquisition reform efforts played a vital role in government reinvention. The main objective of these efforts was to improve efficiency and commercialize government procurement by abolishing inflexible rules and empowering a trimmed workforce. Seven years after passage of the Federal Acquisition Streamlining Act of 1994 (FASA),[1] a new administration is in office and an assessment of the effectiveness of reform initiatives, particularly in the realm of indefinite delivery contracting, is in order.

In rating the success of reform, the crucial question is whether streamlined procurement methods and increased Contracting Officer discretion have improved the manner in which the Government procures its needs. Critics complain that the increasingly unregulated use of indefinite delivery contracts allows agencies to blur the transparency of traditionally rule-bound federal procurement. Others defend that red tape reduction and new contracting tools are the only way a reduced acquisition workforce can get the job done on a tight budget.

FASA-instituted reforms brought measured benefit to the procurement system by way of indefinite delivery contracting. Improvements came, however, at the price of public confidence in the basic contracting principles of integrity, transparency, and competition. At the root of this mounting crisis is the Government's lack of attention to Contracting Officers' training and its failure to effectively manage personnel downsizing. The indiscriminate use of the indefinite delivery contracting tool, an effect of enhanced agency flexibility, threatens to erode public confidence, unless agencies adopt a reasonable number of constraints, accompanied by meaningful guidance and an improved acquisition team approach to contracting.

In the 1970s and 1980s, the Armed Services Procurement Regulations (ASPR) allowed for indefinite delivery contracts, which the Government most popularly implemented in service contracts. They served their purpose

1. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994).

best when the acquiring agency generally knew its requirements but could not anticipate exact quantities. Agencies appreciated the indefinite delivery contract tool as a means of simplifying the solicitation process and relieving administrative burdens, but recognized the risk of inhibiting competition. Congress, meanwhile, warned agencies against issuing task and delivery orders outside the contract scope, relying too heavily on contractors, and failing to use cost as a valid selection criterion.

Today, these concerns remain in need of focused attention. FASA's encouragement of multiple award contracts and removal of General Accounting Office (GAO) bid protest jurisdiction over task orders were intended to promote innovation and Contracting Officer flexibility. The clamor for greater Contracting Officer discretion and workforce downsizing, however, was louder than the general warnings in the Act's legislative history regarding awareness of small business opportunities and vague statements of work. Statutory reforms were met with silence from the Federal Acquisition Regulation (FAR) Council, which failed to furnish any meaningful guidance. Instead, reformers rallied with a cry to entrust Contracting Officers to use their business judgment and achieve the best, most commercial-like result. Reformers criticized the FAR system as hindering Contracting Officer creativity and ability to select the best value offeror. This sentiment stoked a dangerous attitude that fewer rules would translate to greater efficiency.

Recent Inspector General (IG) audits, GAO reports, and protest decisions strongly recommend a tempering of this view. The reports document widespread sole sourcing and cost inefficiencies, said to be the result of Contracting Officers exercising their discretion to limit competition and directing contractors to work beyond the contract scope. Agencies package huge amounts of work into multiple award contracts without seeking multiple offers on orders. Meanwhile, the breadth of the work statements in such contracts makes it nearly impossible for the Contracting Officer to maintain consistent, effective administrative oversight. This frequently results in excessive and costly reliance on the contractor. GAO protest decisions suggest agencies are combining large, diverse work requirements in violation of laws prohibiting bundling. The lost opportunities for small businesses to compete and improper sole sourcing are earning indefinite delivery contracting the reputation of a potentially useful contracting tool run amok.

The problems associated with indefinite delivery contracting can be alleviated, however, if more attention is devoted to accountability and Contracting Officer participation on the acquisition team. Multiple award contracting has been called a great concept plagued by poor implementation.[2] It is much easier to coin symbolic terms, such as "streamlining" and "powering down," in hopes of propelling a procurement revolution than to invest in

2. *See* John Cibinic, *Task Order Contracting: Great Concept, Poor Implementation*, 12 NASH & CIBINIC REP. ¶ 30 (July 1998).

methodical consideration of management solutions.[3] The fragile balance between easing administrative burdens and upholding the timeless procurement principles of competition, integrity, and public scrutiny remains unstable. It will take more than FAR guidance or heightened Office of Federal Policy Procurement (OFPP) awareness to establish an effective fix.

A consciousness-raising is needed to better define and appreciate the role of the Contracting Officer on the acquisition team. Only then can program managers, technical experts, and end users learn to accept that only specific work statements can be well managed. This includes an appreciation that bundled, nationwide work statements are impossible to manage effectively. Otherwise, the value a Contracting Officer adds to the process erodes and the whole procurement suffers. It is time to shift focus to identify tools and adopt policies that enable Contracting Officers to contain and remedy those troubles.

One commentator has gone so far as to describe the present state of affairs in government contracting as one of "lawlessness."[4] It resembles the conditions that led to demands for reform in the early 1980s, with respect to Contracting Officer practices that restricted competition, but then the problems were more comprehensive. Today, improvements in the indefinite delivery process can be made readily.

This article offers recommendations for achieving realistic and legitimate reform within regulatory constraints. Section II provides a comprehensive definition and history of the evolving prevalence of indefinite delivery contracts. Section III describes the early phases of procurement reform and indefinite delivery's discovery as a darling among reformers. Section IV provides an analysis of the Section 800 Panel's efforts, the Federal Acquisition Streamlining Act, and its legislative history. Following these background sections, section V discusses numerous criticisms of indefinite delivery contracting in practice and serious consequences from the continued failure to heed warnings reiterated ever since the early meetings of the Section 800 Panel. Section VI then recommends solutions for the most serious trouble spots; these solutions may include improved, substantive guidance for Contracting Officers, metered regulatory controls to restrain the use of the powerful indefinite delivery contracting tool, and, finally, a simplified approach to encourage and enhance the Contracting Officer's role on the acquisition team. The article concludes that regulatory and perhaps statutory constraints are needed to "legitimize" government flexibility and efficiency.

3. Stephen M. Daniels, *Why We Should Be Concerned About the Movement Toward Procurement Reform*, ARMY LAW. 3, 4 (Mar. 1997).

4. Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 712 (2001).

II. The Evolving Acceptance of Indefinite Contract Vehicles

Generally, an acquisition for goods or services begins with the identification of agency need and some level of planning.[5] This is followed by public advertisement of the solicitation and a competitive award process, governed by a complex set of rules to make each stage of the procurement process fairly transparent to the public and ensure integrity.[6] This may encumber an agency's ability to timely procure goods or services at the best value to the Government. Innovative, nontraditional contract vehicles were developed to overcome such impediments and expedite the procurement process.

For example, an agency is often unable to forecast its long-term needs with definiteness, particularly when contracting for maintenance, personal services, and consumable office supplies. To adjust for such uncertainties, agencies promoted the concept of indefinite delivery contracts. Indefinite delivery contracts earned favor because they allow an agency to avoid overpurchasing or stockpiling supplies that it does not require immediately and to order only when it identifies a need. By the 1970s, despite a lack of statutory recognition, indefinite delivery contracts were widely used.[7]

A. *Definitions*

There are numerous forms of contracts in which the quantity term is variable, including multiyear procurements, indefinite delivery contracts, letter contracts, and job order contracts. The most common of these is the indefinite delivery contract, which comes in three varieties: (1) requirements contracts, (2) indefinite quantity contracts, and (3) definite quantity contracts.[8]

The agency awards a requirements contract with the understanding that the contractor will be its sole provider, at an agreed-upon price, of all the agency's needs defined within the purpose and time period terms of the contract. The contract does not contain a guaranteed minimum award amount; therefore, consideration is achieved in the promise that all orders will be fulfilled by the selected contractor.[9] Successful implementation of requirements contracts requires that the Government make a reasoned, good-faith

5. *See* Prospero S. Virden, Jr., *Indefinite Delivery Contracts*, BRIEFING PAPERS, Apr. 1978, at 1.

6. *See id.*

7. Peter J. Ritenberg, *Task Order Contracts: Popular But Are They Legal?*, 22 NAT'L CONT. MGMT. J. 33, 34–36 (Summer 1988). ASPR 1–201.6, (June 1, 1950); ASPR 3–409, (Feb. 6, 1953); ASPR 3–409 (Mar. 15, 1962).

8. *See* FAR 16.501; ASPR 3–409 (Mar. 15, 1962); Mason v. United States, 615 F.2d 1343 (Ct. Cl. 1980); Virden, *supra* note 5, at 1.

9. *See* ASPR 3–409.2 (Mar. 15, 1962); Torncello v. United States, 681 F.2d 756, 761 (Ct. Cl. 1982); Brawley v. United States, 96 U.S. 168, 172 (1877); Smoot v. United States, 237 U.S. 38, 42 (1915).

quantity estimate to forecast the amount of supplies or services it anticipates it will need.[10]

In *Torncello v. United States*,[11] the seminal case on the distinction between requirements and indefinite quantity contracts, the U.S. Navy entered into a requirements contract with Soledad Enterprises[12] for grounds maintenance and refuse removal, to include rodent pest control, at housing projects in San Diego. During the contract's performance, the Navy identified a need for gopher control. Based upon a competitive bid from its Public Works office the Navy had received prior to its contract award to Soledad, the Navy knew the gopher job could be accomplished for less than the $500 per call Soledad had bid for rat control. When the Navy issued the task order for gopher control to the Public Works office, Soledad filed suit claiming the Government had breached its requirements contract by diverting the work to another source. The Armed Services Board of Contract Appeals (ASBCA) held the Government's failure to comply with the terms of the contract entitled Soledad only to the same recovery as if the Government had terminated its contract for convenience.[13]

On appeal to the U.S. Court of Claims, Torncello, Soledad's successor-in-interest, argued the constructive termination of convenience doctrine should not allow the Government to avoid its contractual obligations. The Navy defended its actions by arguing the contract was actually an indefinite quantity contract, which would allow the Government to make a zero order; alternatively, if it were a requirements contract, the constructive termination doctrine would apply.

The court concluded that Torncello's contract was a requirements contract as opposed to an indefinite quantity contract. It noted that indefinite quantity contracts include an obligatory minimum quantity to provide consideration for otherwise uncertain contract terms. By comparison, requirements contracts promise no specific amount, but they are deemed valid by the Government's guarantee to look to the contractor for fulfillment of all require-

10. *See* Womack v. United States, 182 Ct. Cl. 399 (1968). Under a requirements contract, a contractor will not be eligible for relief if the agency has no actual needs or the actual needs do not coincide with the estimated needs. The contract will be rendered illusory, however, if the Government awards a task order to a competing contractor for work within the contract scope.

11. *Torncello*, 681 F.2d at 758.

12. Torncello was the president of Soledad Enterprises and its successor-in-interest after Soledad went bankrupt.

13. *See* Soledad Enters., Inc., ASBCA Nos. 20376, 20423, 20424, 20425, 20426, 77-2 BCA ¶ 12,552. In the context of a requirements contract, however, this rendered a meaningless result because there were no incurred costs to compensate under the terms of the termination for convenience clause. The court distinguished *Colonial Metals v. United States*, 494 F.2d 1355 (Ct. Cl. 1974), by noting the Government terminated Torncello's contract to take advantage of a price it had known about at the time of award. The Navy's preservation of a means of unlimited exculpation through the convenience termination clause rendered the contract illusory.

ments under the contract as they develop. The Navy's argument would allow the Government at its whim to transform a requirements contract into an indefinite quantity contract with no stated minimum.[14] The court held the contract between Navy and Torncello was not stated in terms that could be interpreted as a guaranteed minimum and was therefore by definition a requirements contract.[15]

The *Torncello* case defines the distinguishing characteristic of indefinite quantity contracts. Indefinite quantity contracts contain stated maximum *and minimum* limits for a determined period of time. The Government obligates itself to purchase a minimum amount of supplies or services and the contractor is assured of minimal sales.[16] The minimum amount established in the contract must be for more than a nominal amount in order to fulfill the requirement for consideration. The opinion also stands for the principle that an agency's ability to avoid its obligations must be limited by more than the "Government's best interests" standard; otherwise, an agency would be merely promising not to do anything against its interest.[17]

The third and final type of indefinite delivery contract is the definite quantity contract. Such contracts provide for the purchase of a definite quantity of supplies or performance of specific services for a stated period of time. Definite quantity contracts often include variation in estimated quantity clauses[18] to provide flexibility. The promises and obligations made by each party in a definite quantity contract define the maximum and minimum performances of each and thereby provide the requisite consideration for enforceability.[19] Promises made under the other two types of indefinite delivery contracts are characteristically less certain.

B. *GAO's First Impressions of Indefinite Delivery Contracts*

By 1962, indefinite delivery-type contracts merited their own ASPR section, which described the three varieties of indefinite delivery contracts available for use when the exact time of delivery is unknown on the award date. The regulation cautioned that requirements and indefinite quantity contracts

14. The court further concluded the Termination for Convenience Clause is only available in situations where the expectations of the parties have changed to the extent that the clause is employed only to allocate risk. Torncello v. United States, 681 F.2d 756, 770 (Ct. Cl. 1982) (citing Willard, Sutherland & Co. v. United States, 262 U.S. 489 (1923)).

15. The Federal Circuit has since reaffirmed the *Torncello* doctrine. *See* Maxima Corp. v. United States, 847 F.2d 1549 (Fed. Cir. 1988). For a discussion of *Maxima*, where the Government improperly retroactively terminated the contract for convenience after completion of contract performance, see John Cibinic, *Contract Claims*, 2 NASH & CIBINIC REP. ¶ 43 (July 1988).

16. *See* Tennessee Soap Co. v. United States, 130 Ct. Cl. 154 (1954); FAR 16.504 (a)(2).

17. *See* John Cibinic, *Convenience Terminations: What Are the Limits?*, 10 NASH & CIBINIC REP. ¶ 52 (Oct. 1996).

18. *See* FAR 52.211–18.

19. *See* Torncello v. United States, 681 F.2d 756, 761 (Ct. Cl. 1982).

were generally appropriate for use only in commercial item and services procurements and when the need was expected to recur.[20]

In the late 1970s and 1980s, indefinite delivery contracts became accepted as legitimate and were popular service contract vehicles. Service contracts tend to include work requirements that vary over the life of the contract and fulfill agency needs that recur with some frequency. It is cumbersome to award contracts at a pace that meets an agency's evolving needs and almost impossible to anticipate those needs to the level of detail needed to write a specific scope of work. A contract for base operations and maintenance, for instance, will involve varying levels of need for lawncare, sanitation, and heating/ventilation/air-conditioning maintenance. Having a single contract from which to issue orders on an immediate basis relieves the burden of administering several contracts and coordinating multiple specialized contractors. More controversial is the view that an indefinite delivery contract also leads to superior pricing because it affords the contractor flexibility to use its employees efficiently. When a boiler room emergency occurs, the Contracting Officer can issue an order without the preparation and competition required for a separate contract.

While agencies enjoyed the use of indefinite delivery contracts, GAO audits during the mid-1970s criticized the agencies' inability to articulate more specific work statements. One audit described indefinite contract instruments as undesirable because they allow the contractor a minimal cost risk.[21] The Comptroller General recognized the contracting tool simplified the solicitation process and relieved the agency of certain administrative burdens in the award process, yet found task order contracts to "violate the spirit of competition."[22] GAO's audit revealed that because many varied tasks arise under a single contract, the Government does not always benefit from performance by the best-qualified contractor at the most advantageous price. GAO refused, in other words, to accept the idea that administrative expediency alone could justify less than maximum competition.[23]

Nevertheless, in 1976, GAO approved the Navy's award of a cost plus fixed fee indefinite delivery contract as proper, despite the lack of a "completely comprehensive statement of work."[24] The Comptroller General apparently was not troubled that the indefinite description would "automatically preclude an effective cost comparison."[25] In later opinions, however, GAO clarified that broad statements of work can indeed "make meaningful

20. *See* ASPR 3–409 (Mar. 15, 1962).

21. *See* Ritenburg, *supra* note 7.

22. *Id.* at 34.

23. *See id.* at 36; Department of Agriculture's Use of Master Agreements, 54 Comp. Gen. 392 (1975); and GENERAL ACCOUNTING OFFICE, REP. No. PSAD-80–35, CONTROLS OVER CONSULTING SERVICE CONTRACTS AT FEDERAL AGENCIES NEED TIGHTENING 18–19, (1980).

24. Grey Advertising, Inc., B-184825, May 14, 1976, 76–1 CPD ¶ 325.

25. *Id.*

competition difficult" and result in a missed opportunity to award to a qualified contractor at the lowest price under a specific task order.[26] GAO also explained that even though the types of compensation listed in the ASPR did not include cost reimbursement or fee awards, statutory construction rules allow for alternatives to be used unless specifically excluded. When the ASPR evolved into the Defense Acquisition Regulation and then into the FAR, the provision for indefinite delivery contract pricing remained the same. Many agencies read GAO's opinion to mean there are few restrictions on the pricing of indefinite delivery contracts.[27] Pricing and quantity estimates remain a central issue of concern today and will be discussed further below.

Agencies took advantage of single-award indefinite delivery contracts to avoid the delays associated with awarding numerous individual contracts for specific requirements and the legal challenges of multiaward contracts.[28] In 1984, the FAR did not define task order contracts but authorized them as a viable contracting instrument despite GAO's initial position of discouraging their use because of the negative impact on competition and best value.[29] Still, GAO had not declared task order contracts illegal.[30]

Also in 1984, in response to an uproar over perceived abuses in federal procurement, Congress passed the Competition in Contracting Act (CICA).[31] CICA defined the principle of "full and open competition" and called attention to small business participation in government contracting. The general foundation for these efforts was the assumption that competition would provide innovation, quality, and affordability and keep government actors honest.[32]

GAO continued to broaden its acceptance of nonspecific solicitation language, despite the CICA's renewed emphasis on competition.[33] GAO also seemed to retreat from its concern about general work statements and limited its scrutiny to solicitations that inhibit intelligent competition by failing to

26. General Accounting Office, B-196489, Feb. 15, 1980, a letter to Chairman John D. Dingell of the Energy and Power Subcommittee, House Interstate and Foreign Commerce Committee.

27. *See* Ritenburg, *supra* note 7, at 37.

28. *See* Mason v. United States, 615 F.2d 1343, 1347 (Ct. Cl. 1980).

29. *See* FAR 2.101.

30. *See* Ritenburg, *supra* note 7, at 39.

31. Competition in Contracting Act of 1984, Pub. L. No. 98–369, 98 Stat. 1175 (1984) (codified as amended in scattered sections of 31 U.S.C. and 41 U.S.C.). In an opening statement to hearings on procurement corruption, the chairman of the House Committee on Government Operations cited $435 hammers as an indication of "the sweetheart deals that occur daily . . . throughout the Federal Government." STEVEN KELMAN, PROCUREMENT AND PUBLIC MANAGEMENT: THE FEAR OF DISCRETION AND THE QUALITY OF GOVERNMENT PERFORMANCE 12, 17 (1990). In Chairman John Brooks's view, the rampant lack of competition was wasting billions in taxpayer dollars. He felt only "full and open competition" could prevent huge firms from monopolizing the government market and charge inflated prices to agencies with which they had earned favor. *Id.*

32. *See generally* Department of Defense Directive No. 5000.1, ¶ 4.3.3 (Oct. 23, 2000).

33. *See* Ritenburg, *supra* note 7, at 41.

give competitors sufficient detail and task orders that exceed the scope of the original contract.[34] The use of task order contracts flourished (based on the relative number protested at GAO), giving at least the impression that agencies were experimenting with innovative contracting techniques.[35] Common examples of task order contracts included services contracts for manpower studies, technical support, information resources, and environmental support.

In those frontier days of indefinite quantity contracting, GAO established at least one strict boundary for the use of task orders. An overly general statement of work in the solicitation was considered susceptible to protest for the improper award of task orders outside the scope of the contract. In *Northeast Air Group*, GAO found that a task order for technical assistance in financial management matters was outside the scope of a contract for financial and compliance audit services.[36] The work statement contained frequent use of vague terms such as "may perform" and "may be required," but this alone did not trouble GAO. The Comptroller General's fundamental concern was that the contractor might not perform at the most advantageous price.[37]

III. The Role of Indefinite Delivery Contracting in Procurement Reform

It was not long before the burgeoning use of indefinite delivery contracting caught Congress's attention. Toward the end of the 1980s, the Government initiated an effort to demystify the complexity of procurement laws and make it easier for agencies to procure needed goods and services. The first meaningful endeavor in this new movement was the Defense Management Review of 1989,[38] an internal DoD examination of organizational and personnel re-

34. *See id.* at 40. In International Security Technology, Inc., B-215029, Jan. 2, 1985, 85-1 CPD ¶ 6, a protest arose out of award of a contract for automatic data processing risk analysis and security audit services. The protester alleged the three hypothetical task orders described in the RFP rendered the solicitation ambiguous so that it was impossible for offerors to determine the required level of effort and compete on an even plane. GAO denied the protest, stating that the test task orders, while limited in detail, provided sufficient description of the location and type of task orders the awardee could expect. Furthermore, GAO noted that with eight firms submitting proposals, there was no evidence to show the solicitation language had inhibited competition.

35. "While we know that the use of task order contracts is widespread and has grown significantly since 1980, we do not know how many are in use and we do not fully know what forms they take or how they are being used." Vernon J. Edwards, *Guest Appearance: The New Rules for Multiple Award Task Order Contracting*, 9 NASH & CIBINIC REP. ¶ 35 (June 1995).

36. B-288210, Jan. 14, 1988, 88-1 CPD ¶ 33.

37. *See id.*

38. Earlier attempts at reform fizzled. In 1986, President Reagan commissioned a Blue Ribbon Commission on Defense Management (also known as the Packard Commission) to study ways to ease the complexity of federal procurement and make recommendations

forms intended to improve the agency's buying practices. DoD sent a report of the resulting changes to Congress in 1990. Congress's most notable response was to institute a DoD Acquisition Law Advisory Panel (Section 800 Panel), as enacted in section 800 of the Fiscal Year 1991 National Defense Authorization Act.[39] Congress tasked the Section 800 Panel to conduct a study of procurement-related laws and recommend specific ways to simplify and streamline those laws to improve the procurement process. Unlike earlier studies with similar goals, the Section 800 Panel was charged with recommending specific changes to acquisition laws.[40]

A. *Section 800 Panel*

The Section 800 Panel's report and recommendations covered a wide spectrum of procurement issues, from commercial items and contracting out to standards of conduct and auditing. In the area of competitive negotiation procedures, the panel focused on methods of streamlining and simplifying the procurement system to increase efficiency.[41] The panel determined that inefficiencies more often arose from agency implementation of statutory requirements than from overly onerous laws. Therefore, the panel report recommended agencies style their supplemental regulations in a fashion that would streamline procedures and avoid inefficiency. This resulted in the excision of large sections of existing regulatory guidance to make room for greater Contracting Officer discretion.[42]

The panel considered the use of task order contracts as part of its review of ways to streamline procurement. The panel report discussed agencies' use of indefinite delivery contracts to avoid statutory competition requirements rather than to enhance cost savings and contractor performance through

for statutory change. The Packard Commission's recommended legislative changes failed to materialize because Congress and the administration were unable to coordinate their efforts. Later Congress attempted, unsuccessfully, to authorize waivers from unspecified acquisition laws under the National Defense Authorization Acts of Fiscal Years 1990 and 1991. Other reform efforts initiated by the Committee on Governmental Affairs did not have enough support to make it out of Congress. *See* William T. Woods, *FASA: How Much Reform Did We Get?*, 30 PROCUREMENT LAW. 11, 11 (1995); Margaret G. Rumbaugh, *Streamlining Defense Acquisition Laws: DoD's Magnum Opus*, 4 TOPICAL ISSUES IN PROCUREMENT SERIES 1, 2 (July 1993); Ralph C. Nash, *Reforming the Procurement Process: Part 1—The Proposals Are Coming*, 7 NASH & CIBINIC REP. ¶ 7, 17–18 (Feb. 1993); S. REP. No. 103–258 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2561, 2564.

39. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101–510. § 800, 104 Stat. 1485 (1990).

40. *See* Rumbaugh, *supra* note 38.

41. *See* Ralph C. Nash, *Reforming the Procurement Process: Part 2—Additional Issues*, 7 NASH & CIBINIC REP. ¶ 12, 34 (Mar. 1993).

42. For example, as the Engineer Contracting Instructions (the U.S. Army Corps of Engineers supplement to the FAR) evolved into the Engineer Federal Acquisition Regulation Supplement, drafters responded to the Section 800 Panel and trimmed the volume from two inches to less than one inch in thickness.

multiple levels of competition[43] and partnering. The review revealed that misuse occurred mostly in the drafting of overly broad work statements and issuance of task orders that exceeded the scope of the original contract. Despite these findings, the panel supported continued use of task order contracting as an important means of allowing the flexibility needed to contract for prospective work.

Recognizing the balance of interests required to properly implement indefinite quantity contracts, the panel recommended Congress enact a new statutory provision identifying procedures for awarding such contracts through competitive negotiations.[44] The panel expected this proposed language to help normalize already widely used indefinite delivery contracts without detracting from their flexibility. The panel viewed this guidance as a positive step toward standardizing task order contracting.[45] To this day, the contracting community continues to await the institutionwide guidance needed to improve indefinite delivery contracting.

B. *SWAT Team Report*

In 1992, the Office of Management and Budget (OMB) established a more limited, civilian agency version of the Section 800 Panel, known as the SWAT Team on Civilian Agency Contracting, which focused primarily on

43. Contractors compete once for the contract and a second time for the task order. *See* FAR 16.505.

44. The panel's recommended procedures are as follows:

(1) When a contract is awarded . . . but does not procure or specify a firm quantity of supplies or services (other than a minimum or maximum quantity), such contract . . . may provide for the issuance of delivery orders or task orders. . . .

(2) Provided that a contract described in paragraph (1) complies with the requirements [below] and with regulations issued pursuant to paragraph (5), the delivery orders or task orders under such contract shall not [require separate notice or competition].

(3) Contracts to which the provisions of paragraph (2) apply shall—

(A) be awarded as a result of a solicitation for which the notice . . . reasonably and fairly describes the general scope, magnitude, and duration of the proposed contract *in a manner that would reasonably permit a potential offeror to decide whether to request a solicitation and consider submitting an offer;*

(B) specify in the solicitation and contract the period of the contract . . . and the maximum quantity or dollar value. . . .

(C) both in the solicitation and contract, *reasonably describe* in the statement of work, specifications, or other description, the *general scope, nature, complexity, and purpose of the supplies or services* to be procured under the contract;

* * * *

(5) The Secretary of Defense shall issue regulations to implement this paragraph . . . and shall provide for appropriate audit and oversight.

DoD Acquisition L. Advisory Panel Rep., Streamlining Defense Acquisition Laws § 1–51 (1993) (emphasis added).

45. *See* Nash, *supra* note 41, at 35.

reforming management controls for cost-reimbursement contracts.[46] This task force again discussed indefinite delivery contracts in mixed terms of support and caution. The SWAT team's report identified the following significant problems in the use of such contracts: inadequate definitions of agency needs in the solicitation's statement of work; frequent failure to prepare independent government cost estimates; procurement of inherently governmental functions, such as contract management; the appearance of improper personal services contract relationships between contractors and government personnel; and the use of cost-reimbursement contracts to procure follow-on work from the same contractor.[47] Generally, the SWAT team pointed to agencies' inattention to management issues such as guidance, training, and resources as the cause for contract administration failings. The report concluded that while contracting professionals need flexibility to do their jobs efficiently, their contract administration responsibilities must be clearly defined. At a congressional hearing announcing the SWAT team report's release, the committee chairman heralded the SWAT team report as a "good jumping off point for the Clinton administration to address the real problems" in federal procurement and "save billions of taxpayer dollars."[48]

C. *National Performance Review*

The following year, in 1993, former Vice President Al Gore's National Performance Review (NPR) reported on reinventing government in "From Red Tape to Results: Creating a Government That Works Better and Costs Less."[49] Among the reforms designed to streamline Government were numerous recommendations and "action items," with great emphasis on granting increased authority and empowerment to procurement personnel and

46. *See* OFFICE OF MANAGEMENT AND BUDGET, SUMMARY REPORT OF THE SWAT TEAM ON CIVILIAN AGENCY CONTRACTING: IMPROVING CONTRACTING PRACTICES AND MANAGEMENT CONTROLS ON COST-TYPE FEDERAL CONTRACTS (Dec. 3, 1992); Nash, *supra* note 38 at 18. *See also EPA's Poor Oversight of Contractor Discussed Before Senate, House Panels*, 57 Fed. Cont. Rep. (BNA) at 381, Mar. 9, 1992.

47. *See* OMB SUMMARY REPORT, *supra* note 46, at 23; Cheryl Lee Sandner and Mary Ita Snyder, *Multiple Award Task and Delivery Order Contracting: A Contracting Primer*, 30 PUB. CONT. L.J. 461, 465 (2001).

48. *Dingell Presses for Aggressive Implementation of SWAT Team Reforms*, 34 GOV'T CONTRACTOR ¶ 721, at 3 (Dec. 9, 1992). A GAO official also testified to support the report findings and reiterate the GAO's position that more reforms were needed. Among the areas GAO identified as most in need of reform were "excessive [and costly] agency reliance on contractors . . . inefficient contract administration, . . . and a lack of management accountability by top agency procuring officials. . . ." To implement necessary improvements GAO suggested establishing guidelines instructing agencies to avoid overly broad and vague statements of work and improve training for government procurement officials. *Id.* at 4.

49. *See* John Cibinic, *'Streamlining' and 'Reinventing' Federal Procurement: Can the Red Tape Be Cut?* 7 NASH & CIBINIC REP. ¶ 55 (Oct. 1993); *National Performance Review Issues Report*, 35 GOV'T CONTRACTOR ¶ 558, 3 (Sept. 15, 1993).

improving responsiveness to customer needs. The intent was to allow managers to make needed purchases unhampered by red tape, while still adhering to the fundamental procurement principles of integrity, openness, competition, and value. This would occur by shifting from "rigid rules" to "guiding principles" and by increasing the discretion afforded contracting officials while ensuring that they exercised their judgment properly when using innovative procurement methods such as indefinite delivery contracts. The report presumed implementation of the Section 800 Panel's call for guidance, but, as discussed below, effective guidance remains lacking and, as a result, reform tempered by oversight has not been achieved.

D. *Increased Discretion and Workforce Reduction*

The "empowerment" theory is well articulated by Dr. Steven Kelman, former administrator of the Office of Federal Procurement Policy (OFPP), whose ideas coincided with the NPR initiatives.[50] In his 1990 book, Kelman prodded agencies to reduce the number of mandatory regulations and instead entrust Contracting Officers with greater judgment and discretion.[51] In criticizing the present state of government procurement, Kelman commented that the goals of equity, integrity, and economy, while easily translated into rules, fail to account for quality. As a result, the Government is unable to get the most for its money.[52] Kelman theorized that limiting the number of rules that bind procurement officials, and empowering them to use their own common sense and judgment in selecting and working with vendors, would make public sector contracting more like commercial contracting. The direct results would be increased quality of procured goods and services as well as improved professionalism within the acquisition workforce.[53] As OFPP administrator for much of the 1990s, Kelman played a central role in the Clinton administration's procurement policy initiatives and attempted to effectuate his themes. The Clinton administration's procurement reforms also urged civilian agencies to focus on building an improved and innovative procurement workforce.[54]

The government-reinvention movement also strove to combine increased

50. Kelman served as OFPP administrator from 1993 to 1997, then returned to his post at Harvard University's Kennedy School of Government. While at OFPP, Kelman "championed a common sense and commercial-like procurement system" for Government. *See Kelman Will Be Remembered as Facilitator of Revolutionary Procurement Reform*, 39 GOV'T CONTRACTOR ¶ 444, 3 (Sept. 17, 1997). He is perhaps best known for rewriting FAR part 15 to broaden Contracting Officer discretion and emphasize contractor past performance. *See id.*

51. *See* KELMAN, *supra* note 31.

52. *See id.* at 10, 14.

53. *See id.* at 89–91.

54. *See* Cibinic, *supra* note 49; *National Performance Review Issues Report*, *supra* note 49.

empowerment with full accountability.[55] Congress intended the Defense Acquisition Workforce Improvement Act (DAWIA)[56] to improve the effectiveness of the professional individuals who work within the defense acquisition system. While policymakers recognized that improvements in the quality and professionalism of the acquisition workforce would not guarantee perfection, they expected the improvements to significantly boost individuals' ability to implement the acquisition process more cost-effectively.[57] A committee report accompanying the Act highlighted the importance of structuring a career program to develop highly qualified professional personnel.[58] In practice, personnel reforms emphasized educational requirements and the mechanical enforcement of eighty hours' mandatory training every two years for acquisition specialists.[59] There does not appear to be a government methodology in place to monitor how consistently and effectively these mandates are fulfilled. Considering the staggering impacts of downsizing on the workload and retention of remaining personnel, it appears that even when training takes place, it may not be enough.

Time has shown that professionalism cannot be imposed through the passage of legislation. Just as Congress has been shortsighted regarding the value of human capital, it has cut training and education funding first in times of budget shortages. As a result, training standards are neither sufficient nor are they adequately funded.[60] The only effective means of improving business practices is through an agency commitment to improving management and providing guidance that incorporates model values and best practices.[61] An effective balance between discretion and accountability demands an earnest management commitment to improving the entire acquisition team and equipping contracting personnel with the necessary business skills to add value to the discussion among the diverse interests present. Successful integration of the acquisition team will require a solid foundation of regulatory

55. *See* Ralph C. Nash, *An Efficient Procurement System: Striking a Balance Between Freedom and Accountability*, 9 NASH & CIBINIC REP. ¶ 30 (May 1995).

56. 10 U.S.C. § 1701 (1990).

57. *See Discussion of the Acquisition Workforce Improvement Act, available at* http://www.acq.osd.mil/ar/dawiadis.html.

58. *See id.*, citing THE QUALITY AND PROFESSIONALISM OF THE ACQUISITION WORKFORCE, May 8, 1990 (Committee Print No. 10).

59. Subject to certain exceptions, DAWIA requires acquisition personnel to complete mandatory contracting courses, have at least two years' experience in a contracting position, and have a baccalaureate degree or twenty-four semester credit hours in business/professional course work. *See* 10 U.S.C. § 1724. The statute also authorizes DoD to establish a means of educating and maintaining a professional corps of acquisition officials. *See* 10 U.S.C. § 1735. Among the specific requirements imposed as a result of the law is a training requirement of eighty hours of training every two years.

60. *See* Michael F. Miller, *Redefining Acquisition Competencies & Programs of Instruction*, 36 CONT. MGMT. 14 (July 1996).

61. *See* John Cibinic, *Professionalism of the Procurement Workforce*, 9 NASH & CIBINIC REP. ¶ 50 (Sept. 1995).

guidance and public service values. Only then is trust developed, thought extended, and confidence restored. These issues will be further explored in the Recommendations section below.

IV. Congress Enacts the Federal Acquisition Streamlining Act

On October 13, 1994, President Clinton signed FASA into law.[62] FASA contemplates the repeal or substantial amendment of nearly 225 legal prescriptions affecting the federal procurement system.[63] The Senate Government Affairs Committee Report described the Act as "a comprehensive overhaul of the federal procurement laws."[64] Members of the acquisition industry heralded the legislation as ushering in "the most extensive changes in federal government contracting" since implementation of CICA.[65] In the arena of indefinite delivery contracting, however, the Act simply legitimized an already popular contracting tool and set forth certain procedures regarding its use.

A. *An Analysis of FASA*

FASA represented in large part an implementation of the Section 800 Panel's recommendations. Like the panel's scope of study, the Act's coverage ranges widely, from adopting commercial-style contracting practices to reducing administrative overhead to keeping pace with technological advancements. As to indefinite delivery contracting, the panel strongly suggested the need for authority and guidance. The plan was that finally government agencies would have a set of rules to follow when using task and delivery orders.[66]

62. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103–355, 108 Stat. 3243 (1994).

63. *See* Mark J. Lumer, *The Federal Acquisition Streamlining Act of 1994*, TOPICAL ISSUES IN PROCUREMENT ISSUES 1 (Oct. 1994). In its 1,800-page report to Congress, the Section 800 Panel presented its analysis of 600 acquisition-related laws and recommended the amendment or repeal of nearly 300 laws. *See* S. REP. No. 103–258 (1994), *reprinted in* 1994 U.S.C.C.AN. 2561, 2563.

64. S. REP. No. 103–258, *supra* note 63, at 2561, 2563.

65. Lumer, *supra* note 63, at 10.

66. In the years leading up to FASA, GAO had tended to be fairly liberal in finding agency task order descriptions to be within scope. It became clear why agencies described task order contracts as the most practicable means to fulfill significant amounts of work. In one instance, the Comptroller General denied a protester's allegation that a task order for phase-in work was outside the scope of the original solicitation, which included fabrication, development, and "other efforts" determined necessary by the Contracting Officer. GAO held the task order reasonably fit within the latter task area, without commenting on the extreme breadth of its description. KMS Fusion, Inc., B-242529, May 8, 1991, 91 CPD ¶ 447. In another protest, GAO held that the agency's broad statement of needed services could reasonably be understood to encompass the allegedly out-of-scope task order. However, the Comptroller General did comment that the Government must

Contracting Officers governmentwide are still waiting for this regulatory guidance.

In its report accompanying FASA, the Senate Government Affairs Committee referred to a complex and unwieldy set of existing procurement rules in need of reform to overcome frequent abuses such as cost overruns, increased delays, and fraud.[67] Sections 1004 and 1054 of the Act, which apply to DoD and civilian agencies respectively, are intended to increase consistency among DoD and civilian agencies and simplify matters for industry members.[68] They authorize agencies to enter into contracts for the procurement of goods or services without specifying a firm quantity, other than a minimum and a maximum. These contracts are defined as task order contracts when the procurement is for services and delivery order contracts when the procurement is for goods.[69] Contract performance is executed through the agency's issuance of orders for work described in the solicitation's statement of work.

Under FASA sections 1004 and 1054, solicitations for task and delivery orders are required to include the duration of the contract, the maximum quantity or value, and a statement of work that "reasonably describes the general scope, nature, complexity and purposes of the services or property to be procured under the contract."[70] Agency heads are authorized to award single or multiple award task or delivery order contracts, but the statute establishes a preference for awarding multiple award contracts to the maximum extent practicable.[71] Moreover, a task or delivery order cannot itself increase the scope, period, or maximum value of the contract under which it was issued. This can be accomplished only by modifying the underlying contract.[72] A separate section of FASA addresses task order contracting for advisory and assistance services.[73]

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have a legitimate reason to bundle so many diverse requirements together under a single contract to avoid unduly limiting competition. *See* Astronautics Corp. of America, B-242782, June 5, 1991, 91-1 CPD ¶ 531.

67. *See* S. REP. No. 103-258, *supra* note 63, at 2561, 2563.

68. *See id.* at 2572; William T. Woods, FASA: *How Much Reform Did We Get?*, 30 PROCUREMENT LAW. 11 (1995).

69. *See* Pub. L. No. 103-355, § 1004 (1994) (implemented at 10 U.S.C. § 2304d).

70. *See* 10 U.S.C. § 2304a(b).

71. *See* 10 U.S.C. § 2304a(d).

72. *See* 10 U.S.C. § 2304a(e).

73. *See* 10 U.S.C. § 2304b. The Section 800 Panel had not contemplated distinct treatment of advisory and assistance services. (This generally refers to consulting services and may include support services for acquisition officials.) However, the statute imposes stricter limitations and requirements on this type of contract. The period of a task order contract for advisory and assistance services is limited to five years including options or modifications. Moreover, multiple awards are required on such contracts that extend longer than three years and exceed $10 million. *See* Anthony Gamboa, *Task and Delivery Orders: Problematic Requirements Under FASA*, 31 PROCUREMENT LAW. 15 (Fall 1995). The stricter terms may have been implemented in reaction to a 1991 DoDIG Audit that found that DoD had failed to establish an effective policy for advisory and assistance contracting

FASA also sets forth basic requirements for the issuance of orders. Separate notice in the *Commerce Business Daily* is not mandated when an agency plans to award a task order. In a multiple award situation, however, all awardees must be given a "fair opportunity" to be considered for each order in excess of $2,500.[74] Protests are not authorized in connection with the issuance of an order except when the ground for protest is that the order exceeds the scope of the underlying contract.[75] To provide the oversight otherwise inherent in the bid protest process, the statute requires the agency head to appoint a task and delivery order ombudsman.[76] These basic provisions clearly reflect Congress's heavy reliance on the Section 800 Panel's report.

B. *Legislative History*

The Senate Governmental Affairs Committee Report on FASA used a cautionary tone to describe task and delivery contracting and proscribed potential abuses, similar to concerns first raised by the Section 800 Panel. The report warned: "The indiscriminate use of task order contracts for broad categories of ill-defined services unnecessarily diminishes competition and results in the waste of taxpayer dollars."[77] The report also underscored the value of providing "reasonable consideration" to all multiple awardees as a means of ensuring cost effectiveness without "significantly burdening the procurement system."[78] Congressional authorization of the indefinite delivery contracting tool, the report explained, was intended to grant agencies broad discretion in establishing procedures for the evaluation and award of task orders under multiple award contracts.[79] CICA's procedural requirements were lifted to give agency officials wide latitude to choose the most appropriate evaluation factors and techniques for a particular project.

The Senate Armed Services Committee's separate report agreed that the legislation's goal was to give procurement officials flexibility to implement acquisition reform rather than establish additional statutory procedures. However, the committee recognized that this increased empowerment might

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with indefinite quantity contracts and options and recommended they be discontinued and replaced with fixed-price contracts and presolicitation conferences to identify small businesses. *See* OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF DEFENSE AUDIT REPORT NO. 91-041, CONTRACTED ADVISORY AND ASSISTANCE SERVICES CONTRACTS (Feb. 1, 1991).

74. *See* Pub. L. No. 103-355 § 1004 (1994) (implemented at 10 U.S.C. § 2304c(a) & (b)).

75. *See* 10 U.S.C. § 2304c(d).

76. *See* 10 U.S.C. § 2304c(e). The ombudsman, although rarely used in practice, is putatively responsible for reviewing contractor complaints and ensuring fair opportunity for all contractors.

77. S. REP. No. 103-258, *supra* note 63, at 2561, 2576.

78. *Id.*

79. *See id.*

tempt some contracting officials to rely on large, established businesses to supply goods and services. It promised to work with the Committee on Small Business and the Committee on Governmental Affairs to oversee the implementation of FASA to ensure that it would enhance the ability of small disadvantaged businesses to compete for task and delivery order contracts.[80] Regrettably, this well-intentioned teaming failed to come to fruition.

From the date FASA was issued, observers called for regulatory guidelines that would anticipate and minimize potential problems in the use of task and delivery contracts.[81] FAR Case 94–711 provided basic implementation of FASA with only minimal guidance from the FAR Council.[82] Aside from implementing the terms of the statute, the only additional prescribed guidelines were that Contracting Officers should exercise "sound business judgment" and "broad discretion."[83] The new regulations failed to address many of the troubling issues arising from the combination of widened discretion and a contracting tool with nearly unlimited potential. The FAR Council's initial revision of subpart 16.5 failed to meaningfully assist the procurement workforce to implement reform policy in a reasoned, effective manner.[84]

Despite the initial reaction that FASA represented a sea change in the world of federal procurement, the drafters themselves recognized the Act was "but the first step towards comprehensive acquisition reform. There are many aspects of the acquisition process . . . that require management changes within the Executive Branch rather than more statutes."[85] The principles of empowerment and streamlining simply have not lived up to their early billing. Promised guidance never materialized. Overworked, understaffed contracting offices exercise their discretion by taking the path of least resistance and sole-sourcing orders rather than investing the hard thinking necessary to create a responsible framework for evaluation and award.

The key to nurturing a reform movement rooted in the empowerment of its contracting personnel is to encourage and equip those individuals to willingly accept and exercise that new freedom. Time has shown that Contracting Officers need and seek guidance before they can wield their discretion responsibly. Procurement reform legislation has failed to address this problem. Increased attention to the management of the acquisition workforce and some level of restraint in the exercise of indefinite delivery contracts are needed in order to get effective reform back on track.

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80. *See* S. REP. No. 103–259 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2598, 2603.

81. *See* Peter J. Ritenburg, *Task Order Contracts: Popular and Now 'Legal,' but New FAR Coverage Should Address Potential Problems*, 26 NAT'L CONT. MGMT. J. 10 (1995).

82. *See* 60 Fed. Reg. 49,723 (Sept. 26, 1995).

83. *Id.* at 49726, § 16.505(b).

84. *See* Vernon J. Edwards, *The New Rules for Multiple Award Task Order Contracting*, 9 NASH & CIBINIC REP. ¶ 35 (June 1995).

85. S. REP. No. 103–259, *supra* note 80, at 2598, 2603.

V. Repeated Criticisms of Indefinite Delivery Contracting Practices Mandate Improvements

Many embraced the red tape reduction and streamlined procedures of acquisition reform, despite early warnings, as a tremendous cost- and timesaving improvement. Kelman called initiatives such as increased indefinite delivery contracts and governmentwide acquisition contracts (GWACs) "common sense approaches to procurement that save the taxpayer money and the Government time and other valuable resources."[86] There is, however, an ominous side to the combined raising of restrictions, empowerment of Contracting Officers, and "monitoring" rather than "managing" of contractor performance.[87] The following section will chronicle the major areas of concern that have developed as discretion widened and regulation waned.

One of the most apparent dangers of the movement to increase Contracting Officer discretion is the resulting tendency to equate regulatory silence with consent.[88] Among its efforts to encourage the use of innovative contracting techniques to improve government practices, the FAR Council issued a revision to FAR subsection 1.102. It provides that where a procurement "strategy, practice, policy or procedure is in the best interests of the Government and is *not addressed in the FAR*" nor proscribed by statute, executive order or regulation, it can be implemented in keeping with the spirit of innovative practices.[89] This text summarizes the spirit of a streamlined FAR that trades wordy guidance for broadened Contracting Officer discretion. However, Contracting Officers under unrealistic pressures have cited this provision to justify expedited practices that limit competition. Contracting Officers will cut corners when overwhelmed by customer demands and desperately turn to indefinite delivery contracts to accomplish assignments with minimal planning, preparation, and competition. While the FAR encourages near unrestrained Contracting Officer discretion, the lack of guidance clearly transgresses the FASA drafters' intent.

A. *The* Valenzuela *Protest and the Dangers to Small Businesses of Limited Competition*

When Contracting Officers choose to ignore alternatives that encourage competition in favor of more efficient means, it is often small businesses that bear the greatest consequences. Anticompetitive practices led to increased

86. *Agencies Seek to Increase Small Business Participation in Task Order Contracts*, 68 Fed. Cont. Rep. (BNA) No. 5 (Aug. 4, 1997), *available at* http://pubs.bna.com.

87. Craig Olson, *From Cradle to Save: Revolutionary Acquisition Force Structure Alternatives for the 21st Century*, ACQUISITION REV. Q. 165, 169 (Spring 2000).

88. *See* Ralph C. Nash, *Breakthroughs in Acquisition Reform*, 9 NASH & CIBINIC REP. ¶ 52 (Sept. 1995).

89. FAR 1.102 (d) (emphasis added).

Comptroller General scrutiny, to the extent such review is within GAO's limited jurisdiction to hear bid protests arising out of task orders.[90]

In response to a protest by *Valenzuela Engineering, Inc.*,[91] the U.S. Army Corps of Engineers alleged it had conducted acquisition planning consistent with FAR 7.103, to include a thorough internal discussion of issues such as competition procedures and small business participation, prior to issuing a request for proposals (RFP) in support of the Operation and Maintenance Engineering Enhancement (OMEE) Program.[92] The agency awarded two indefinite delivery/indefinite quantity (IDIQ) contracts under this solicitation. One of the contracts was for operation and maintenance (O&M) and incidental repair and replacement services for designated facilities, at an estimated value of $26.5 million. Originally, the Corps intended the scope of work to cover only emergency repair of medical facilities, but the solicitation was not so restricted. Instead, it contemplated provision of "O&M contracting support for Army and Air Force activities on a world-wide basis."[93]

Valenzuela, a small business, held an Air Force 8(a) contract[94] for O&M services at Nellis Air Force Base (AFB). For reasons unrelated to Valenzuela's capability, the Air Force deleted certain engineering and construction tasks from its contract. Subsequently, the Corps issued the RFP for its OMEE IDIQ contract. No small businesses or 8(a) firms submitted offers in response. Sometime after the Corps awarded two contracts to large businesses, the Air Force decided it would not exercise the option on Valenzuela's contract. Rather, without coordinating with the Small Business Administration (SBA) or considering whether the work was appropriate for a small business set-aside, the Air Force determined it could more efficiently satisfy its requirements at Nellis AFB through one of the Corps' two task order contracts.[95]

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90. *See* FAR 16.505(a)(6).

91. Valenzuela Eng'g, Inc., B-277979, Jan. 26, 1998, 98–1 CPD ¶ 51.

92. The OMEE program had four objectives: (1) to enhance the operation and maintenance (O&M) of new and existing complex facilities by developing maintenance concepts and system requirements; (2) to provide assistance to develop systems and equipment inventories and to identify system and equipment deficiencies and remediation; (3) to provide experts to identify requirements for the upgrade of life safety and critical systems to enhance public safety and to ensure accreditation of health care facilities; and (4) to provide contracting support for OMEE program participants. Information Paper provided by senior agency attorney.

93. *Valenzuela Eng'g*, 98–1 CPD ¶ 51, at *2. The solicitation had originally stated the services would be provided "in the continental United States, Hawaii and Alaska," but was later modified to include the statement "and outside the continental United States." *Id.* at *22.

94. See section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994), authorizing the SBA to contract with government agencies and establish performance via subcontracts with socially and economically disadvantaged small business concerns. Valenzuela qualified as such a business.

95. In practical terms, the Air Force requested, pursuant to the Economy Act, 31 U.S.C. § 1535, that the Corps administer O&M services at Nellis AFB. The Air Force made the request under a Military Interdepartmental Purchase Request (MIPR), which

Valenzuela filed a GAO protest against the award of a delivery order. The Corps and the Air Force countered that the protest was untimely because the Air Force had notified Valenzuela a full month earlier of its intent to acquire O&M services at Nellis AFB from another contractor.[96] The Comptroller General agreed the protest was untimely, but accepted Valenzuela's request to "consider the issues raised as significant to the procurement system" by writing letters of concern to the Secretaries of the Army and the Air Force.

The Comptroller General's letters addressed whether the existing system of soliciting IDIQ contracts conflicted with the Small Business Act. In a letter to GAO, filed as supplemental comments to the Corps' agency report, the SBA explained that when an agency seeks to fulfill under another agency's contract a requirement that was not contemplated in the statement of work, the procuring agency "must conduct the relevant small business inquiry in accordance with FAR Subpart 19.5."[97] It appeared contracting officials, in exercising their discretion, deliberately circumvented small business regulations and policy.

In its letter to the Air Force Secretary, the Comptroller General identified two statutory violations caused by the overly broad statement of work: (1) the Air Force's failure to coordinate the removal of the Nellis AFB requirement from the small business program and consider the requirement for a small business set-aside in compliance with the Small Business Act and (2) the failure to achieve full and open competition under CICA. The GAO was unconvinced by the Air Force's assertion that the Corps' approach was "more cost effective than initiating a new acquisition process" and dismissed it as insufficient justification for avoiding compliance with the FAR requirement for SBA review.[98] The Air Force's attempt to circumvent the FAR in the interest of time and cost efficiency was simply unacceptable.

The *Valenzuela* letters also suggested the Government's tendency to combine large, diverse work requirements under a single contract restricted meaningful competition and encouraged contract bundling. SBA's response to GAO's request for comment contended that the inclusion of the Nellis AFB requirement in the USACE O&M contract met the definition of contract bundling.[99] According to SBA, the consolidation makes "small business

authorized both the transfer of funds from the Air Force to the Corps and the issuance of delivery orders by the Corps.

96. Under the GAO Bid Protest Regulations, a protest must be filed within ten calendar days after the protester knew or should have known of the basis of protest. *See* 4 C.F.R. § 21.2 (a)(2) (2000).

97. Letter from David R. Kohler, Associate General Counsel for General Law, Small Business Administration, to Charles Morrow, Office of General Counsel, U.S. General Accounting Office at 2 (Nov. 14, 1997) (on file with author).

98. Valenzuela Eng'g, Inc., B-277979, Jan. 26, 1998, 98-1 CPD ¶ 51 at Comptroller General Letter to Air Force Secretary F. Whitten Peters (Jan. 26, 1998).

99. *See* Letter from David R. Kohler, Associate General Counsel for General Law, Small Business Administration, to Robert Murphy, General Counsel, U.S. General Accounting Office at 5 (Oct. 28, 1997). "Bundling" is defined as "consolidating two or more

prime contract participation unlikely" by grouping geographically diverse requirements.[100] Moreover, when it bundled the Nellis AFB requirements, the Corps overlooked its obligation to report the bundling[101] and denied SBA the opportunity to recommend means of preventing small business exclusion.

In its letter to the Army, GAO described the Corps' IDIQ contract as so broad as to be inconsistent with the requirements defining appropriate use of task order contracts at 10 U.S.C. § 2304a and in CICA.[102] The Comptroller General further noted that "an overly broad statement of work can unjustifiably diminish competition just as bundling does, by deterring businesses, particularly small businesses, from competing for a contract, notwithstanding their ability to perform some of the work at issue."[103]

GAO's letter cited the very language Congress used in its 1994 report on FASA, warning that "indiscriminate use of task order contracts for broad categories of ill-defined services unnecessarily diminishes competition and results in the waste of taxpayer dollars."[104] The Senate Government Affairs Committee's premonitions had been realized: overreliance on Contracting Officer judgment, combined with the FAR Council's failure to provide express guidance had denied Valenzuela the opportunity to compete.

Two years after *Valenzuela*, Congress asked GAO to review whether acquisition reform had actually reduced small businesses' opportunity to compete for government contracts.[105] In GAO interviews, representatives of small business associations identified the codification of indefinite delivery contracts and multiple award preference as reforms that had adversely impacted small businesses by creating the potential for grouping multiple agencies' needs and work statements that covered a large, geographically diverse area.[106] Small businesses lacked experience with such large, nationwide contracts and stood no realistic chance of competing for them.

The GAO report also notes that despite various, new streamlining efforts designed to broaden Contracting Officers' discretion to find innovative ways of doing more with less, SBA and GSA statistics showed "small businesses received a higher share in fiscal year 1999 of expenditures on new contracts over $25,000 for most categories of goods and services than they did in fiscal year 1993."[107] In addition, expenditures to small business under multiple

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requirements for supplies or services, previously provided or performed under separate smaller contracts, into a solicitation for a single contract that is likely to be unsuitable for award to a small business concern due to" size, dollar value, geographical diversity, or any combination of such. FAR 2.101.

100. *See* Kohler Letter, *supra* note 99.

101. The Small Business Act, as amended in 1993, and FAR 19.202-1(e) require agency reporting.

102. *See Valenzuela Eng'g*, 98-1 CPD ¶ 51.

103. *Id.*

104. S. REP. No. 103-258 (1994), *supra* note 63, at 2561, 2576.

105. *See* GENERAL ACCOUNTING OFFICE REPORT, SMALL BUSINESS: TRENDS IN FEDERAL PROCUREMENT IN THE 1990s at 3 (Jan. 2001).

106. *See id.* at 4.

107. *Id.* at 6.

award contracts increased from $524 million in FY94 to $2 billion in FY99 and expenditures to small businesses for IDIQs from FY94 to FY99 remained consistent at $7 billion.[108] While GAO did not find any quantifiable negative effect of procurement reform on small businesses, the report raised awareness of the effects increased Contracting Officer discretion can have on small business.

GAO issued a separate report in early 2000, concluding that because of limited agency reporting, insufficient governmentwide data exist on the level of contract bundling and its impact on small businesses.[109] GAO's analysis of data in the Federal Procurement Data System, however, dispelled concerns raised by the SBA's Office of Advocacy that federal agencies had fallen short of meeting the governmentwide goal of awarding 23 percent of prime contracts to small businesses.[110]

Overall, though, GAO's review of procurement activities at three agencies showed that consolidation of contracts by agencies seeking to streamline their buying resulted in reduced numbers of contractors and contract dollars. "Officials at the three sites reviewed believed that contract bundling had, at most, a limited effect on the share of contracts and contract dollars awarded to small businesses." In response, the SBA pledged to create a system for monitoring contract bundling. Again, while not conclusive, these reports suggest the exercise of Contracting Officers' discretion can be tempered by requiring them to provide reasoned justification for any decision to group distinct work descriptions under a single solicitation.[111]

Notwithstanding the statistical results of GAO's reports, the most immediate effect of restricted competition appears to be on small businesses' ability to participate. Valenzuela's toothless protest highlighted FASA's effective silencing of small businesses, which are often unable to protest an agency's failure to abide by the law. Under the circumstances, it was highly unlikely Valenzuela would learn the Army had issued a task order solicitation that might include the work it was performing at Nellis AFB.[112] Only by chance could Valenzuela have realized it might be displaced in time to file a preaward protest capable of yielding a meaningful result. The Comptroller General recognized that "no potential offeror could reasonably have anticipated, when the task order contracts were initially being competed, what

108. *See id.* at 20.

109. *See* GENERAL ACCOUNTING OFFICE REPORT, SMALL BUSINESS: LIMITED INFORMATION AVAILABLE ON CONTRACT BUNDLING'S EXTENT AND EFFECTS (Mar. 2000).

110. This goal reflects the percentage of the total dollar value of federal prime contractors that are considered small. Because there are no reporting requirements for credit card purchases, which account for 5 percent of all procurements, small business's competition statistics account for only 95 percent of the pie. *See* GENERAL ACCOUNTING OFFICE REPORT, *supra* note 105, at 21–22.

111. *See* Ritenburg, *supra* note 81, at 4.

112. *See* GAO *Tells Air Force, Army Vague, Overbroad Work Statement Violates Competition Law*, 69 Fed. Cont. Rep. (BNA) No. 9, at 228–29 (Mar. 2, 1998).

specific facilities and services would be actually provided under the contracts."[113] GAO called this displacement of small businesses "one of the problems associated with overly broad work statements."[114] More problems will arise if Congress and the administration do not recognize the implications of reduced competition and Contracting Officers' tendency to trade competition for efficiency.

B. *A Troubled Silence: FASA's Bar Against Bid Protests Challenging Task and Delivery Orders*

Displacement, however, is only one facet of reduced competition. In addition, disappointed offerors are barred by statute from filing a protest against the award of a task order.[115] GAO consistently has held that FASA generally precludes protests against task order awards except when the task order expands the scope, period, or maximum value of the contract under which the order is authorized.[116] The only additional ground for jurisdiction GAO has read into the FASA rule is when the agency's actions create a mandatory down-select among multiple awardees, removing an awardee from consideration for future task orders.[117]

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113. *See* Valenzuela Eng'g, Inc., B-277979, Jan. 26, 1998, 98–1 CPD ¶ 51 at *26.

114. *Id.* at **25–26.

115. *See* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103–355, 108 Stat. 3243 (1994) (as implemented at FAR subpart 16.5).

116. *See* 41 U.S.C. § 253j(d) and 10 U.S.C. § 2304c(d). *See, e.g.*, Makro Janitorial Services, B-282690, August, 18, 1999, 99–2 CPD ¶ 39 (task order to obtain services not reasonably provided for in the original solicitation held improper, should have been procured through full and open competition); Ervin & Assoc., B-278850, Mar. 23, 1998, 98–1 CPD ¶ 89 (sustaining a protest that alleged a task order for performance of a demonstration program was out of scope even though the solicitation contemplated a "broad range" of services, in part because such a program was not authorized at the time of award); Floro & Assoc., B-285451.3, B-285451.4, Oct. 5, 2000, 2000 CPD ¶ 172 (task order for management support found materially different from that reasonably contemplated by the IDIQ contract for noncomplex integration services).

117. *See, e.g.*, Electro-Voice, Inc., B-278319, B-278319.2, Jan. 15, 1998, 98–1 CPD ¶ 23 (holding the practice of down-selecting among contractors, so that all but the selected contractor are eliminated from receiving more task orders under the contract, is antithetical to FASA's intent that multiple award task ordering promote an ongoing competitive environment); Corel Corp., B-283862, Nov. 18, 1999, 99–2 CPD ¶ 90; (the Comptroller General dismissed a protest alleging the Department of Labor's decision to issue a delivery order under another agency's IDIQ contract for Microsoft products was tantamount to an improper sole sourcing, because it failed to argue the delivery order was out of scope or implemented a "down-select," "regardless of the propriety of the issuing agency's underlying determinations or conduct (absent certain exceptions not applicable here)."); The Intrados Group, B-280130, June 22, 1998, 98–1 CPD ¶ 168 (in dismissing the protest, the Comptroller General explains the exception to the protest restriction for "down-selections" does not apply where the Government bundles multiple task orders into a single task order, without foreclosing the protester's ability to bid on future task orders); United Information Systems, Inc., B-282895, B-282896, June 22, 1999, 99–1 CPD ¶ 115 (dismissing protest filed by a multiple awardee that alleged the agency selected

In the past eight years, GAO has experienced a significant decline in protest filings. The proliferation of indefinite delivery task order contracts has been suggested as among the likely causes.[118] If so, this would be an unfortunate secondary effect of procurement streamlining. Well-founded bid protests clarify regulations, enforce procurement laws, ensure a sense of fair dealing, and provide meaningful deterrence of statutory and regulatory violations.[119] The preservation of these seminal values well justifies the expenditure of resources in the pursuit and defense of bid protests.[120]

Procurement reform shifted the orientation focus from competition to efficiency. With limited access to protest forums, offerors might be less willing to take the risk associated with competing.[121] More than an oversight mechanism, the bid protest system is the most efficient method of policing the contract formation process. For a thorough discussion of the risks associated with limited bid protest rights, see Michael Benjamin's article *Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies* in this issue of the *Journal*.

C. *GAO Provides Transparency and Accountability Despite the Bar Against Protests*

In two bid protests, GAO construed the statutory restriction on protests narrowly and addressed task order contracting issues. In *Ocuto Blacktop & Paving Co., Inc.*[122] and *N&N Travel & Tours, Inc.*,[123] GAO held the statutory bar on protests against task orders does not apply where the protest in essence raises a question regarding the underlying solicitation. GAO arguably overreached its statutory jurisdiction to review cases where small businesses were restricted from competition. These noteworthy opinions indicate GAO is

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a task order contract to circumvent CICA and avoid GAO review, because the bar on protests is part of FASA, not a matter of agency discretion, and the protester was given an opportunity to compete). *See also* AudioCARE Systems, B-283985, Jan. 31, 2000, 2000 CPD ¶ 24 (holding the statutory restriction on protests does not apply when a competition for issuance of a delivery order is held between an IDIQ contract holder and an offeror outside the IDIQ contract).

118. *See* Steven L. Schooner, *Who's Watching Now?*, LEGAL TIMES, Apr. 26, 1999, at S27.

119. *See* Joseph J. Petrillo, *Comments on the May 1998 Issue*, 12 NASH & CIBINIC REP. ¶ 47 (Aug. 1998).

120. Ralph Nash has taken the position in his monthly report that "protests 'disrupt the procurement process' and 'waste the participants' resources.' " While he recognizes that protests often provide assurance that laws are followed, in the vast number of cases it is the public that benefits more than the protester itself. Ralph C. Nash, *Comments on the May 1998 Issue*, 12 NASH & CIBINIC REP. ¶ 47 (Aug. 1998). The *Valenzuela* protest is the perfect example of a case that yielded the legally right outcome, but provided no direct justice to the protester. With such results more likely in bundled contracts, one can understand why potential offerors have filed fewer protests against indefinite delivery contracts.

121. *See* Schooner, *supra* note 118, at S27.

122. B-284165, Mar. 1, 2000, 2000 CPD ¶ 32.

123. B-285164.2, B-285164.3, Aug. 31, 2000, 2000 U.S. Comp. Gen. 128.

aware of the potential for lawlessness in indefinite delivery contracting and is asserting its authority to provide accountability.

In another recent case, however, GAO limited the "insufficient notice" exception, dismissing a small business protest contesting the Corps' issuance of a task order for hospital housekeeping services at Fort Bragg, North Carolina, under an IDIQ contract for O&M services at government medical facilities.[124] Hospital Klean, which held a Fort Bragg housekeeping contract, alleged the task order was outside the scope of the original contract and should have been set aside for 8(a) concerns. The Comptroller General found the allegation essentially challenged the underlying IDIQ contract.

Comparing its circumstances to the *Valenzuela* case, Hospital Klean argued the statement of work was overly broad and complained it could not reasonably have known the agency intended to issue an order solely for housekeeping services under any of the multiple award contracts. The Comptroller General was unconvinced and noted the solicitation properly and specifically enumerated all the services the agency might order, to include housekeeping services. Thus, the solicitation had put Hospital Klean on notice of its need to file a protest before proposals were due.

The Comptroller General's decision to base its *Hospital Klean* holding on the premise that a broad, nationwide solicitation put firms on notice to file a preaward protest is troubling. GAO has effectively warned small businesses to be alert for solicitations issued anywhere in the country listing general requirements that might potentially overlap with work they presently perform. The distinction between *Hospital Klean* and *Ocuto* or *N&N Travel* is a matter of how well the agency manages to specify projects contemplated under a potentially expansive, nationwide contract. These recent cases suggest that GAO grants a voice only to protesters when the statement of work in the underlying IDIQ contract solicitation is impossibly vague or the Government misled the firm.

Notably, the Court of Federal Claims (COFC), which is now the sole federal court to share bid protest authority with the GAO,[125] has heard very few bid protests filed against task and delivery order awards. In one recent case, the protester contested the Navy's sole-source award of training flight services under a competitively awarded IDIQ contract.[126] The court reasoned the protest was not barred as a challenge to the Government's actions in awarding a task order because the real issue was the Air Force's issuance of a modification to the underlying Navy contract. The court held the contract's work statement, which contemplated worldwide aircraft training services, was broad enough to allow the agency to avoid competing a modification for

124. *See* Hospital Klean, Inc., B-286791, Dec. 8, 2000, 2000 U.S. Comp. Gen. LEXIS 179.

125. On December 31, 2000, the sun set on district courts' authority to decide bid protests under their so-called Scanwell jurisdiction. Scanwell Laboratories v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). *See* 28 U.S.C. § 1491.

126. *See* Phoenix Air Group, Inc. v. United States, 46 Fed. Cl. 90 (2000).

work in the Far East and Hawaii. The court's opinion devoted several pages to describing the agency's numerous attempts to overcome funding problems and award a contract for services in the Far East and Hawaii. The court, however, failed to comment on the huge scope of the Navy's worldwide contract.

The COFC recently took jurisdiction over a disappointed offeror case, unpersuaded by the defendant's argument that Federal Supply Schedule (FSS) orders are not protestable under FASA.[127] The record showed the Immigration and Naturalization Service held a competitive source selection designed to select an offeror with a GSA FSS contract, thereby engaging in a more extensive selection process than that contemplated by the FSS system. The court held that when an agency goes beyond the simplified process of placing an order against an existing FSS contract, a disappointed bidder may challenge the award under the arbitrary and capricious standard of 5 U.S.C. § 706(2)(a).[128] This interpretation of FASA and FAR part 16 may prove to be a chink in the armor of the barrier against task order bid protests. It qualifies the "arbitrary and capricious" rule broadly and is difficult to refute as an unreasonable standard.

If firms were to consider that they have little chance of filing successful protests against IDIQ contracts of enormous scope, they would likely quit filing. Fewer protests would translate to less precedent on which offerors and agencies alike could rely for consistent clarification of statutes and regulations.[129] Protests also offer lessons learned that must be shared among all participants in the procurement process so that practices can evolve and improve. For the public at large, protests provide a window into the Government's fiscal practices.[130] This transparency is essential to maintain public confidence.

D. *Poorly Estimated Quantities and the Loss of Contractor Faith*

Successful multiple award IDIQ contracting relies in large part on contractors continuing to submit their best proposals throughout the duration of the contract. This can be an expensive proposition for contractors. Because agencies often over- or underassess their estimates, the built-in maximum and minimum quantities clause is intended to protect a contractor from being forced to perform at a rate that exceeds its capacity or causes underperformance.[131] A contractor can suffer costly losses, however, when the agency identifies a nominal minimum, sole-sources orders to other multiple award-

127. Labat-Anderson, Inc. v. United States, 50 Ct. Cl. 99 (2001).

128. *See* Ellsworth Assoc., Inc. v. United States, 45 Ct. Cl. 388, 395–96 (1999).

129. *See* Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 702–05 (2001).

130. *See* Schooner, *supra* note 118, at S27.

131. *See* A. Jeff Ifrah, *Under the Umbrella: Do the Rewards Justify the Risks?*, LEGAL TIMES, June 22, 1998, at S48.

ees, or terminates before the contractor makes a return on its investment. The Government cannot afford a reputation of doing business in bad faith. Best value contracting is contingent on competition by all capable firms.[132] Contracting Officers must uphold the principal values of integrity and transparency to encourage full competition.

This section will focus on the increasing discouragement and disillusionment among contractors that must accept poorly estimated quantities of work and inflexible task order bidding rules as a result of the unreasonable constraints contracting personnel bear.

1. Estimated Quantities

Requiring offerors to submit price proposals for each task order grants the Government the benefit of continuous competition and on the spot pricing, while allowing the contractor to tailor its product or services to the needs of each customer under the master contract.[133] Contractors, especially small businesses, risk losing money, however, if required to submit expensive, specially priced proposals for every task order under a contract with a broadly drafted, geographically diverse work statement. OFPP advises agencies to "be mindful of the costs that contractors will incur to provide proposals . . . in response to requirements for task or delivery orders."[134] It further suggests methods of improved cost effectiveness such as reducing the number of awards under the master contract and allowing contractors to submit a "no bid."[135] Agencies have implemented these comments only sparingly.[136]

The FAR has never required agencies to establish estimated quantities when issuing IDIQ solicitations, primarily because such estimates are inherently unreliable when it comes to indefinite delivery contracting. The Comptroller General, however, consistently has held that "a solicitation for an indefinite quantity of services must contain estimates, since without them the agency cannot compare proposals on an equal basis or ascertain which offeror submitted the lowest overall cost."[137] When an agency has overestimated its needs, rather than underutilize or allow the contract to become hollow, Contracting Officers sometimes modify it to extend its duration, without increasing price, to get full use of existing funding. Naturally, competition suffers when such backhanded measures are taken. Not only does the Government lose the opportunity to find a better price, but the contractor may be unable to recoup its costs or compete for another job.

132. *See generally* Department of Defense Directive No. 5000.1 ¶ 4.3.3, Oct. 23, 2000.

133. *See* Ifrah, *supra* note 131, at S48.

134. *Id.* at S49, citing Office of Federal Procurement Policy, Office of Management and Budget, Best Practices for Multiple Award Task and Delivery Order Contract (interim ed. 1997), *available at* http://www.arnet.gov/Library/OFPP/Best Practices.

135. OFPP, *supra* note 134, at 18.

136. *See* Ifrah, *supra* note 131, at S48.

137. West Coast Copy, Inc., B-254044, Nov. 16, 1993, 93–2 CPD ¶ 283.

The COFC recently clarified the standard for determining government liability regarding the accuracy of its estimates in indefinite quantity contracts. The court held that when a contractor files suit against the Government for breach of contract arising out of inaccurate estimates of work in an indefinite delivery contract, the contractor must show "well nigh irrefragable proof" to establish bad faith.[138] The day before the COFC released this opinion, the Federal Circuit had issued a decision in a case of similar circumstances overturning the GSBCA's holding that contractors should not bear the risk when misled by the Government.[139]

The facts of the *Travel Centre* case would make any government contractor cringe.[140] GSA had awarded Travel Centre an indefinite delivery contract estimated at $2.5 million for travel services in New England. Travel Centre subsequently established a New England office and went to work, only to learn from GSA that the estimate had included work for an agency that no longer intended to procure under the GSA contract. When Travel Centre shut down its new office to reduce costs, GSA terminated its contract. The Federal Circuit's decision failed to mention the board's finding that GSA had known four months before award that the award amount was overstated. Instead, the court simply held the IDIQ contract had included a minimum guarantee of $100 and, because Travel Centre made more than $100 under the contract, the Government's contractual obligation was fulfilled.[141]

138. Schweiger Constr. Co., Inc. v. United States, 49 Ct. Cl. 188 (2001) (The court refused to rely on the GSBCA's holding that a standard of "reckless negligence" was appropriate, because that standard is more akin to the "negligence" standard under which contractors can seek recovery for inaccurate government estimates in *requirements* contracts.).

139. *See* Barram v. Travel Centre, 236 F.3d 1316 (Fed. Cir. 2001).Travel Centre was appealing the GSBCA's quantum decision, Travel Centre v. Gen. Servs. Admin., GSBCA No. 14057, 99-2 BCA ¶ 30,521 (1999). That decision was founded on an earlier entitlement decision, where the board held that GSA had breached its contract with Travel Centre. *See* Travel Centre v. Gen. Servs. Admin., GSBCA No. 14057, 98-1 BCA ¶ 29,536 (1997).

140. *See* John W. Chierichella and Jonathan S. Aronie, *Unwary Rabbits Beware: IDIQ Means Never Having to Say You're Sorry*, GOV'T CONT. AUDIT REP. 16, 18 (Feb. 2001).

141. The ASBCA has held that a contractor can terminate for convenience even *before* it orders the minimum quantity promised under the contract, so long as there is no showing of bad faith or abuse of discretion. *See* Montana Refining Co., ASBCA No. 50515, 00-1 BCA ¶ 30,694 (1999). The Defense Logistics Agency (DLA) had awarded Montana Refining an IDIQ contract for jet fuel, which estimated the quantity at 13.3 million gallons and guaranteed purchase of about 10 million. The next year DLA partially terminated the contract when it realized it had overestimated its needs and reduced the quantity to 10.2 million gallons. DLA ultimately purchased only 7.7 million gallons. When Montana Refining filed a breach claim, the board rejected its argument that the Government's failure to order the minimum quantity rendered the contract illusory. The board refused to encroach on the Government's right to terminate contracts for convenience and saw "no reason why indefinite quantity contractors are entitled to greater protection against convenience terminations than other types of contractors." *Id.* at 151,627. If that is the case, IDIQ contractors had best be wary. *See also* Whiter. Delta Constr. Int'l, Inc., CAFC

When an agency establishes a minimum quantity that is only a nominal amount, this also damages contractor confidence in the procurement system. In many situations, there are minimal funds available at the time a multiple award IDIQ contract is awarded, and that amount becomes the minimum quantity. From this scenario emerge large, multimillion-dollar IDIQ contracts over several years stating minimum quantities that might be less than 2 percent of the overall projected cost. This vast imbalance can devastate businesses that spend large sums to bid for contracts with grand promises and loaded work descriptions, only to have the contract hollowed by competing multiple award contracts or flawed estimates.

Placing contractors on alert that "anyone who is dumb enough to rely on the Government's promises deserves what he gets"[142] is no way for the Government to market its Multiple Award Schedule (MAS) contracts to competitive firms. When the Government loses the trust of companies that feel they have been duped by clumsy estimates, a sense of heightened risk spreads to other firms. Ultimately, taxpayers pay for this risk in the form of increased cost.[143]

2. Fair Opportunity to Compete

Industry members also have criticized agencies' inflexibility toward enforcing offerors' "fair opportunity" to compete. In many situations it may be unjust to compel a master contract awardee to submit an offer for work it cannot afford when the Government has other viable options. In a worst-case scenario, failure to submit a proposal could lead to default damages and jeopardize the government contractor's professional future.[144] Similarly, there are circumstances in which it is reasonable for a Contracting Officer to use his or her discretion to sole-source individual orders, as in instances where only one offeror can perform specialized services. Industry members have complained that agencies often inappropriately complete orders for which direct assignment is a more economical and efficient solution.[145] They criticize Contracting Officers who fail to use wise business judgment in administering the very contract type intended to encourage independent discretion.

In response to industry concerns about task order contract administration, Steve Kelman, then-administrator of OFPP, issued a memorandum to senior agency procurement officials urging them not to interpret the FAR's "fair opportunity to be considered" language as a rigid mandate. Under contracts for commercial off-the-shelf or information technology products, where the

No. 01-1253, ASBCA No. 52162, 01-1 BCA ¶ 31,195 (holding that when an IDIQ contract is breached due to the government's failure to order the minimum, the contractor is entitled to recover the amount of loss suffered as a result of the breach); Hermes Consol., Inc., ASBCA Nos. 52308, 52309, 2002 ASBCA LEXIS 11 (Feb. 15, 2002).

142. *Travel Centre*, 98-1 BCA ¶ 29,536, at 150,714.

143. *See* Chierichella, *supra* note 140, at 18.

144. *See* Ifrah, *supra* note 131, at S48.

145. *See Industry Group Outlines Concerns About New Rules for Task Order Contracts*, 66 Fed. Cont. Rep. (BNA) No. 6, at D-8 (Aug. 4, 1996), *available at* http://pubs.bna.com.

Contracting Officer already has information to evaluate which awardee can provide the best value, requiring awardees to compete with each order could cause an unnecessary burden.[146] In such situations, Contracting Officers are able to compare prices via price sheets and the awardees achieve a fair opportunity to compete when they post their products and prices.[147] A Contracting Officer who uses well-reasoned discretion to instill flexibility in the partnering relationship among task order contractors will find the "best value" goal is better served.

Agencies must evaluate the benefits gained by using indefinite delivery contracts on a case-by-case basis and recognize their limits in order to avoid overestimating quantities and disillusioning offerors.[148] At the front end, accurate estimates enable an agency to better conduct a competitive proposal process and accurately measure the cost to the Government. A solicitation might request prices of sample tasks[149] or compute cost by extending unit prices over estimated quantities.[150] During contract administration, Contracting Officers must closely manage contractors as orders progress and continuously update performance reports. When the contractor is at a remote site, as is often the case with geographically disperse contracts, the contractor might be able to identify earlier than the Government whether quantity estimates are accurate.

Experience suggests, however, that Contracting Officers have a dangerous tendency to rely on the contractor in large nationwide contracts where the contract administration staff is small and often off-site. Contracting Officers must be vigilant and recognize that the Government's interests often suffer when the agency depends heavily on contractor perceptions without a balanced perspective.[151] The Contracting Officer must recognize that streamlin-

146. *See OFPP Tells Agencies They Need Not Compete Each Delivery Order Under Multiple Award Contracts for COTS Products*, 66 Fed. Cont. Rep. (BNA) No. 5, at D-4 (July 29, 1996), *available at* http://pubs.bna.com.

147. *See id.*

148. *See* John Cibinic, *Task and Delivery Order Contracts: The Pot Is Boiling*, 13 NASH & CIBINIC REP. ¶ 18 (Mar. 1999).

149. *See* High Point Schaer, B-242616, B-242616.2, May 28, 1991, 91-1 CPD ¶ 509 (in a protest arising out of the procurement of litigation support services, the Comptroller General found acceptable the agency's pricing of a hypothetical claim as a basis for cost comparison because the sample task provided a common basis, requiring offerors to designate able disciplines); Aalco Forwarding, B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 (in contracting for moving services, the agency properly used the pricing of a sample shipment of household goods as a cost comparison).

150. *See* West Coast Copy, B-254044, B-254044.2, Nov. 16, 1993, 93-2 CPD ¶ 283 (the Comptroller General sustained a protest against the agencies' comparison of unit prices for various types of copying where it failed to factor in the quantities of labor used in contract performance).

151. A GAO audit report concluded the Army should improve the way it evaluates the costs of services provided and set specific performance goals for the contractor in an enormous $2.2 billion service contract for troop support in the Balkans. GAO determined the heart of the auditing problems was the lack of job training for contract employees overseeing the cost reimbursement contract. *See* GENERAL ACCOUNTING OFFICE, REP. NO.

ing ends at contract award, and therefore large scoped, nationwide IDIQ contracts are often more complex, rather than easier, to administer than traditional, fixed-price contracts.

E. *The Balancing Act: Do Multiple Awardees Have a Fair Opportunity to Compete and Is the Government Getting the Full Benefit of the Multiple Award Preference?*

As discussed above, in creating a preference for multiple award indefinite delivery contracts, Congress intended to afford "broad discretion" to Contracting Officers in obtaining competition.[152] The only established limitation was that each of the multiple awardees be afforded "a fair opportunity to compete."[153] Disheartenment develops when competitors sense that they would not win a task order because the Contracting Officer favors an incumbent or preferred contractor. There is widespread evidence of this type of corner-cutting and reduced competition throughout Government. OMB has declared it intolerable.[154] The challenge for Contracting Officers is to be aware of the market and understand the industry well enough to reasonably determine when it makes sense to open a task order only to limited offerors and when full competition is necessary.

OFPP drafted a "Best Practices for Multiple Award Task and Delivery Order Contracting" Guide with the stated purpose of "help[ing] agencies re-engineer their traditional procedures for awarding orders under the old, single award IDIQ contracts and take full advantage of the flexibilities available today when using multiple award contracts."[155] Examples of best practices

GAO/NSIAD-00-225, ARMY SHOULD DO MORE TO CONTROL CONTRACT COST IN THE BALKANS (2000).

152. *See* S. REP. No. 103-258 (1994), *supra* note 63, at 2561, 2576. The COFC has found that by failing to consider the benefits of making multiple awards under a contract for local telecommunications services for federal agencies nationwide, a Contracting Officer acted in violation of FAR 16.504(c). The agency's decision to award a single IDIQ contract was held to be "arbitrary, capricious and contrary to law." The court, however, did not find the geographic scope of the proposed contract to be antithetical to the requirement for full and open competition. Winstar Communications, Inc. v. United States, 41 Ct. Cl. 748 (1998).

153. 10 U.S.C. § 2304c(b) and 41 U.S.C. § 253j(b); implemented in regulation at FAR 16.505(b)(1). Both the statute and regulation include an exception to the "fair opportunity" requirement if the Contracting Officer makes a determination that (a) the agency's needs are urgent, (b) only one source is capable, (c) the order is a logical follow-on to an order already issued under the contract, and (d) it is necessary to place an order to satisfy a minimum guarantee. *See* John Cibinic, *Task and Delivery Orders: What's a "Fair Opportunity"?* 12 NASH & CIBINIC REP. ¶ 60 (Dec. 1998).

154. *See* DEPARTMENT OF DEFENSE INSPECTOR GENERAL AUDIT REPORT No. 99-116, DoD USE OF MULTIPLE AWARD TASK ORDER CONTRACTS 10 (1999).

155. OFPP, *supra* note 134, at 2. In issuing the interim guide, Kelman described multiple award task order contracts as "one of the most important innovations to come out of FASA because they allow the benefits of streamlining and ongoing competition." *OFPP Issues Interim Guidance on Task and Delivery Order Contracting*, 68 Fed. Cont. Rep. (BNA) No. 6, at D-11 (Aug. 11, 1997), *available at* http://pubs.bna.com.

include (1) cooperation among Contracting Officers, end users, and industry to develop a clear statement of work; (2) limiting award to a number that is high enough to assure competition, but low enough to keep ordering manageable; and (3) using an interactive solicitation development process between industry and government to ensure understanding of requirements and increase "partnering."[156]

Unfortunately, OFPP's Guide, without the effect of law, has been of minimal benefit. Its warnings against overly vague statements of work, unauthorized sole-source orders and reduced Contracting Officer involvement, among others, have been largely ignored. It appears the Guide, which remains in its 1997 "interim edition" state, is not on OFPP's agenda for updating. One might interpret the present OFPP regime's distancing from the Guide as recognition, in retrospect, that it was a naive, oversimplified solution.

As such, Contracting Officers lack a reliable source for guidance as to when and whether price proposals should be submitted by all awardees.[157] Generally, broadly scoped contracts provide for a wide range of services that must be tailored to the requirements of each order and appropriately priced. In identifying the best-value contractor, it is important to compare the contractors' technical approaches to a task and establish a basis for negotiating price.[158] The path of least resistance for many Contracting Officers, however, is simply to avoid the burden of evaluating price proposals and documenting a best-value determination. Other times the easiest route is to rely solely on price lists. This lack of consistency is the inevitable result of insufficient substantive guidance and a contracting workforce without market savvy.

F. *The Proliferation of Interagency Contracting and Questionable Service Fees*

The MAS is an additional contracting option that allows Contracting Officers to avoid competition. When GSA first established MAS, its goal was to make it user-friendly for customers and provide a large assortment of reputable goods and services at competitive prices. The Federal Supply Schedules (FSS), a collection of GSA-issued MAS, are catalogs of firms offering goods and services to agencies at identified times and prices.[159] Selection for inclusion on the list implies the firm has competed for award; therefore, orders placed against the MAS are considered to have endured full and open competition.[160]

Agencies order off schedules for simplicity and efficiency. The schedules themselves are widely popular because they are implemented in the form of

156. *See* OFPP, *supra* note 134, at 4–5.

157. *See* Cibinic, *supra* note 153.

158. *See* GENERAL ACCOUNTING OFFICE, REP. No. GAO/NSIAD 98–215, ACQUISITION REFORM: MULTIPLE AWARD CONTRACTING AT SIX FEDERAL ORGANIZATIONS 2 (1998).

159. *See* John Cibinic, *MAS: What Are They?* 11 NASH & CIBINIC REP.¶ 60 (Nov. 1997).

160. *See* 10 U.S.C. § 2302(2)(C) (1994) and 41 U.S.C. § 259(b)(3) (2001).

broadly defined task and delivery order contracts.[161] IDIQ contracts are often the method of choice for the FSS and GWACs because they allow numerous agencies to order diverse requirements quickly without having to conduct separate procurements. Reliance on the Economy Act also permits one agency to procure under another's contract without full and open competition, provided the original contract was awarded in compliance with CICA.[162]

This practice of ordering and servicing relationships among agencies is arguably a win-win proposition. The ordering agency achieves administrative savings by avoiding the time and cost of awarding and managing a new contract, while the servicing agency receives a fee for its share of the ministerial costs.

Lacking careful management, however, agencies have abused this powerful tool, leading Congress to address at least part of the problem.[163] The FAR Council answered by mandating documentation of an agency's determination that placing the order is in the best interest of the Government. The agency also must show the goods and services cannot be as efficiently and affordably purchased directly from a contractor.[164] The proliferation of GWACs also has caused some to question whether an accountability system exists to confirm that servicing agencies hold the required issuing authority.[165]

The use of task and delivery order contracts to execute interagency orders has been associated with the same kinds of abuses as indefinite delivery contracting. The common denominator is the receding role of the Con-

161. "Contract off-loading is the use by one procurement office, under the authority of the Economy Act, 31 U.S.C. §§ 1535, 1536, of the contracts of another office to fulfill its requirements." Ralph C. Nash, *Contract Off-Loading: A Proper Downsizing and Streamlining Tool?* 10 NASH & CIBINIC REP. ¶ 24 (1996).

162. Economy Act transactions, however, are not exempt from SBA regulations. In its decision letter to the Secretary of the Air Force, discussed above, GAO specifically stated that the Air Force's use of the Economy Act as a contracting medium did not exempt it from adhering to the Small Business Act. *See* Valenzuela Eng'g, Inc., B-277979, Jan. 26, 1998, 98-1 CPD ¶ 51.

163. *See* Pub. L. No. 103-355, § 1074, 108 Stat. 3243 (1994).

164. *See* FAR 17.503; Nash, *supra* note 161.

165. The authority for GWACs derives from the Clinger-Cohen Act of 1996, 40 U.S.C. § 1412(3). For an order to be valid, the servicing agency must have delegated authority to use the Act's provisions from the Director of the OMB. *See* Cibinic, *supra* note 2. The four original GWACs were issued by the Department of Transportation (Information Technology Omnibus Procurement), Defense Information Services Agency (Defense Enterprise Integration Services II), National Institutes of Health (Chief Information Officer-Solution and Partners), and GSA (Federal Systems Integration and Management). Recognizing that the system needed some policing, the program managers for each of the four GWACS signed a set of guiding principles for managing their programs. The joint pact promises to support sound competition and improve governmentwide contracting processes. *See Program Managers Set Up "Rules of Road" for GWACS*, 39 GOV'T CONTRACTOR ¶ 446, at 4 (Sept. 17, 1997). More agencies have since awarded GWACS, and a complete list can be found at http://genesis.gsfc.nasa.gov/nasa/adpmass.htm. *See* Cibinic, *supra* note 2.

tracting Officer and his or her ability to enforce rules intended to preserve competition.

VI. Recommendations for Improvement

For several years, we have learned to live with streamlined efficiency, innovative contracting methods, and doing more with less—all progeny of the procurement reform movement. In practice, flaws have surfaced. Since passage of FASA, the FAR Council has issued three rounds of regulatory guidance concerning indefinite delivery contracting and a fourth has been issued for comment, but the government contract community has found its guidance to be for the most part ineffective. If nothing constructive is done, the precarious combination of broadly termed indefinite delivery contracts steered by overworked, undertrained acquisition personnel will have a crippling impact on the Government's ability to procure and the public's faith in its performance. This section contains a discussion of efforts taken to improve the present circumstances—some effectively, others less so. It further includes the following recommendations: (1) to share best practices among agencies and institute substantive internal guidance in the face of the FAR Council's failure to implement meaningful governmentwide regulations, (2) to generate congressional attention to systemic abuses similar to methods used by small businesses fighting bundling, and (3) to draft a genuine, long-term plan for improving professionalism among Contracting Officers.

A. *Why FAR Revisions to Date Have Failed to Provide a Solution*

The FAR changes since 1995 concerning indefinite delivery contracts can be described generally as simple and uninspiring. The first set of rules implemented pursuant to FASA defined task order and delivery order contracts, prohibited protests in connection with task and delivery order awards, created an ombudsman position, established the preference for multiple awards, and established instances in which single awards are more appropriate, all discussed above. The background section to FAR Case 94–711 explained that the regulation "contains no specific procedures for making awards of indefinite quantity contracts in order to empower agencies to develop selection criteria that meet needs of each acquisition."[166] Subsequently, when problems began to arise out of vague work statements and a general indolence regarding the issuance of task orders, critics clamored for more practical guidance.

The FAR Council's subsequent revisions were consistent with the OFPP's goal of enabling Contracting Officers to use their discretion to fuel innovation. In 1999, FAR Case 98–007 prohibited agencies from establishing "preferred offerors," or employing designation and allocation among multiple awardees, as a means of simplifying and standardizing the issuance of orders.[167]

166. FAR Case 94–711, 60 Fed. Reg. 49,723, 49,724 (Sept. 26, 1995).
167. Federal Acquisition Circular 97–12 (Aug. 16, 1999).

Agencies were to give each multiple awardee a fair opportunity to compete for task or delivery orders, thereby upholding the principle of continuous competition. A DoD IG audit uncovered Contracting Officers' frequent practice of sole-sourcing task orders without consideration of price and without documenting their use of discretion.[168]

In reaction to similar reports of Contracting Officers trading efficiency for competition, the Senate inserted language in the DoD Authorization Act for FY2000 requiring the FAR Council to issue yet another set of revised regulations.[169] Section 804 of the Act ordered specific guidance on the appropriate use of governmentwide contracts. It also called for guidelines to guarantee clear work statements and a "fair opportunity" process when awarding and administering multiple award task and delivery order contracts.

There was a sense of hope within government contracting circles that these regulations might provide the substantive guidance Contracting Officers desperately needed. Again there was disappointment when the changes amounted to purely generalized suggestions. FAR Case 99–014 merely emphasized criteria for the Contracting Officer's consideration in determining whether to make multiple awards and required documentation of that decision. It also underscored the use of performance-based statements of work and required consideration of cost or price among the factors in the selection decision for orders, but it was too little too late.

In response to congressional concern regarding oversight and additional guidance for multiple award–type contracts, GAO focused its most recent review of task order contracting on DoD's use of large orders under multiple-award IT contracts.[170] This report is being considered and evaluated by the FAR Council as it prepares FAR Change 99–303, which is discussed below.[171] GAO recommended the FAR Council develop regulations to provide

168. *See* DEPARTMENT OF DEFENSE INSPECTOR GENERAL AUDIT REPORT No. 99–116, DoD USE OF MULTIPLE AWARD TASK ORDER CONTRACTS 15–19 (1999).

169. *See* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106–65, 113 Stat. 512 (1999).

170. *See* Martha A. Matthews, *Senate Panel to Look at Need for Guidance, Oversight for Multiple Award-Type Contracts*, 72 Fed. Cont. Rep. (BNA) No. 16, at 513 (Nov. 11, 1999); GENERAL ACCOUNTING OFFICE, REP. No. GAO/NSIAD-00–56, CONTRACT MANAGEMENT: FEW COMPETING PROPOSALS FOR LARGE DoD INFORMATION TECHNOLOGY ORDERS 1 (2000).

171. GAO investigated whether contractors were afforded a fair opportunity to compete for orders, and whether ordering offices were clearly identifying the scope of work under task or delivery orders. GAO's review of twenty-two large orders indicated that many of the orders were awarded without competition, exceptions to the "fair opportunity" requirement were often implemented, and contractors often failed to submit offers when presented with the opportunity. In sixteen of twenty-two orders, only one offer was submitted. Furthermore, in interviews with contractor representatives, GAO learned that most task order descriptions are broadly and vaguely drafted, contemplate cost reimbursement, and often span several years of effort. In response, agency officials noted that a great deal of uncertainty exists in specifying future IT needs because of constantly evolving requirements. *See* GAO REP. No. GAO/NSIAD-00–56, *supra* note 170, at 1.

guidance that agencies must (a) avoid awarding follow-on orders whose scope exceeds the original order for which there was competition, (b) encourage the use of fixed-price contracts as part of a preference for performance-based statements, (c) take part in more outreach meetings with contractors being considered for award of offers, and, finally, (d) obtain the full benefit associated with the expanded competition of multiple-award contracts.

FAR Proposed Rule 99–303 also is intended to implement that portion of section 804 mandating guidance on governmentwide and multiagency contracts. The proposed revision was recently published in the *Federal Register*, inviting comments.[172] The FAR Council intends the amendment to clarify acquisition planning considerations that should be implemented in the earliest stages of planning for multiple-award indefinite delivery contracts. Specifically, the revised language draws attention to using ordering vehicles that facilitate access by small business concerns and early coordination with the competition advocate for plans proposing other than full and open competition. The proposed revision also emphasizes that development of an acquisition plan is not waived for GWACs and reasserts that the head of the agency must designate a task- and delivery-order ombudsman.[173] The new revisions do little more than reemphasize earlier recommendations and are hardly worth the wait.

GAO continues to audit indefinite delivery contracts precisely because Contracting Officers have learned to stay within the letter of the rules without embodying their spirit. Trouble often follows when uniquely complex circumstances are wedged into existing boilerplates. It always will be more tempting for Contracting Officers to employ unfocused, stock work descriptions than to tailor such descriptions to particular situations. It is only human nature to choose the path of least resistance.

Agency leaders must make significant revisions at the supplemental regulation level to implement guidance addressing very specific problem areas. The process might start with generic best-practices principles borrowed from other agencies, but it will be more effective if it evolves into guidelines illustrated by concrete examples. Contracting personnel will find such examples to be a useful and substantial foundation upon which to build.

The *Valenzuela* case had a sobering effect at the Corps, which responded to GAO's letters with several rounds of regulatory fine-tuning. More importantly, the reforms have become a team effort with representation and suggestions from field elements, centers of expertise, and small business, contracting, and legal offices. The revisionists returned to the beginning and addressed the need for clarification at Engineer FAR Supplement Part 7,

172. *See* FAR Case 1999–303, Federal Acquisition Regulation: Task-Order and Delivery-Order Contracts, 66 Fed. Reg. 44,518 (Aug. 23, 2001).

173. *See id.*

Acquisition Planning. The Army acquisition leadership has reinforced the importance of such combined efforts in a memorandum to senior leaders encouraging "the integration of the efforts of all personnel responsible for significant aspects of the acquisition" at the acquisition planning phase.[174] The message refers to the Contracting Officer as a key business advisor whose expertise in the many available contracting vehicles is of great value to the acquisition team.

The Corps has adopted a unique concept to improve the acquisition team's ability to manage and self-police its procurement strategies, by requiring contracting personnel to draft a yearly master plan, including maximizing the use of indefinite delivery contracts while avoiding hollow contracts. The procedures for developing this annual plan involve basing minimum dollar amounts on known work requirements and identifying at least one known requirement before an indefinite delivery contract is advertised. The guidance also calls for review of certain acquisition plans by the deputy for small business to ensure a mix of large and small indefinite delivery contracts. The underlying interest in all these added guidelines is to promote competition and small business opportunities.

A more complex challenge for the Corps is to award broad, robust contracts with the proper balance of marketing the agency's contracting abilities without discouraging small business participation or resulting in underutilization. This means drafting solicitations that specify the customer, work type, and geographic boundaries, as well as providing written justification and establishing head of contracting activity (HCA) oversight of nationwide indefinite delivery contracts.

NASA has been at the forefront of agency efforts to issue internal guidance on IDIQ contracts. Its guidance instructs the Contracting Officer to structure solicitations to include sample tasks and ensure a valid basis for evaluation of cost and technical factors. Its regulations also require selection of contract types commensurate to cost risk and drafting orders in performance-based terms within the contract scope. Performance-based terms are favored because they hold contractors accountable for the price of the orders and quality of technical performance.[175]

During her confirmation hearings before the Senate Governmental Affairs Committee, the new OFPP Administrator, Angela Styles, remarked that the founding principles of federal procurement—competition, integrity, and transparency—must not be compromised for efficiency.[176] Speaking broadly, Styles criticized the confusion surrounding implementation of streamlining

174. *See* Acquisition Planning Memorandum from Kenneth J. Oscar, Assistant Secretary of the Army for Acquisition, Logistics and Technology, to all Army commanders and program executive officers (Aug. 3, 2001) (on file with author).

175. *See NASA Issues Guidance on ID/IQ Contracts for Technical Services, Supplies*, 69 Fed. Cont. Rep. (BNA) No. 20, at 571 (May 18, 1998).

176. *See OFPP Nominee Says Efficiency Shouldn't Be at Expense of Procurement Concepts*, 75 Fed. Cont. Rep. (BNA) No. 21, at 520 (May 22, 2001).

initiatives and recognized her office's challenge would be to "balance the obvious benefits of increased efficiencies" while addressing "serious competitive problems that have arisen."[177] It appears that, while indefinite delivery contracting is a perfect example of a reform initiative in need of attention, Styles's main focus, at least initially, will be to fix the broken OMB A-76 Circular system and emphasize the use of performance-based service contracts.[178] As cycles go, indefinite delivery contracting has had its turn on OFPP's and FAR Council's front burner and newer issues have come to the fore. Agency leadership will have to assume responsibility and provide internal guidance with best practices that build upon existing regulations.

B. *Lessons Learned from Efforts to Tighten the Regulation of Contract Bundling*

To the extent statutory changes are needed to curb abuses of the indefinite delivery contracting tool, advocates for reform can look to recent restrictions imposed on contract bundling for a paradigm. The Comptroller General recently described allegations of improper bundling and unduly restricted competition as leading to the

> intersection of three significant procurement initiatives—the *desire to maximize full and open competition* by prohibiting the unnecessary consolidation of discrete requirements in a manner that restricts competition; the *desire to maximize federal government reliance on small business prime contractors* by barring consolidation of procurements into packages that are not suitable for performance by small businesses; and the *desire to streamline government purchases* by, among other approaches, using preplaced (and often broadly-scoped) contractual instruments . . . to add speed and flexibility to an agency's buying power.[179]

These same three elements should be part of every reasoned approach to returning accountability and competition to indefinite delivery contracting. Bundling is one of indefinite delivery contracting's unpleasant side effects, but meaningful advances have been made in controlling its abuse. Lessons can be learned and shared from measures taken to bring bundling under control.

Just as with task and delivery order contracts, bundling has received a great deal of scrutiny from the DoD IG [defined above] and GAO, as well as the SBA Office of Advocacy. In part because the reports rely heavily on statistical data, the resultant recommendations vary. An SBA Office of Advocacy report charges that the increasingly popular practice of bundling is "accelerating the concentration of larger and fewer federal contracts into the hands of larger and fewer companies."[180] It cites a decline since the beginning

177. *Id.* at 521.

178. *Id.*

179. Phoenix Scientific Corp., B-286817, Feb. 22, 2001, 2001 CPD ¶ 24 (emphasis added).

180. U.S. SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY, THE IMPACT OF CONTRACT BUNDLING ON SMALL BUSINESS FY 1992–FY 1999, at v (2000).

of the procurement reform era of contract dollars awarded to small businesses. Seventy-nine billion dollars were awarded in bundled contracts in FY 1999, and only 16 percent of the small businesses that won bundled contracts that year accounted for 84 percent of all small business revenues.[181] At that level, bundled contracts cost small businesses $26 billion annually and are hurting small business owners.[182] In addition to violating policy goals, this practice will have a detrimental impact on the Government's ability to acquire its needs at competitive prices and ensure a stable procurement industry base.[183]

The Office of Advocacy also has convinced the House Small Business Committee that bundling is in large part to blame for DoD's failure to meet its 23 percent goal for small business awards.[184] Small businesses have two vocal advocates on the committee, Chairman Donald Manzullo (R-Ill.) and ranking member Rep. Nydia Velazquez (D-N.Y.), who question DoD's commitment to small business. As a result, Velazquez introduced a bill that would prohibit agencies from consolidating requirements until they have achieved their small business goals.[185] Manzullo held hearings urging DoD to give small businesses more opportunities to compete. Velazquez implored the Comptroller General to sustain a protest filed by a small business challenging the Air Force's solicitation for a multibillion-dollar multiple-award IDIQ contract consolidating technical weapons system support services for three logistics centers, calling it a "David v. Goliath story."[186] In Washington, it often takes congressional pressure for an issue to effect change. Advocates of change in the indefinite delivery contracting arena should organize their interests and target the Government Reform Subcommittees in both houses to publicize the many flawed and unfair aspects of indefinite delivery contracting.[187]

Despite the high-profile attention brought to bear on bundling, there

181. *See id.*

182. *See id.*

183. *See id.* at vi.

184. *See DoD Acquisition Reforms Are Hurting Small Business, House Panel Told*, 75 Fed. Cont. Rep. (BNA) No. 26, at 664 (June 26, 2001).

185. *See* The Small Business Contract Equity Act of 2001, H.R. 1324 (Mar. 29, 2001); *DoD Acquisition Reforms*, *supra* note 184.

186. *Two Congressmen Appeal to GAO on FAST Solicitation on Behalf of Small Georgia Firm*, 75 Fed. Cont. Rep. (BNA) No. 7, at 180 (Feb. 13, 2001). Notably, the firm was not a constituent to either member.

187. Congressional lobbying will not be devoid of controversy. While the SBA Office of Advocacy claims bundling and federal acquisition reforms of the mid-1990s have hindered small businesses because of the tendency to issue solicitations with overly broad work descriptions, two recent GAO reports show bundling has little or no impact on small businesses. *See* GENERAL ACCOUNTING OFFICE, REP. NO. GAO/GGD-00-82, SMALL BUSINESSES: LIMITED INFORMATION AVAILABLE ON CONTRACT BUNDLING'S EXTENT AND EFFECTS (2000); GENERAL ACCOUNTING OFFICE, REP. NO. GAO-01-746, CONTRACT MANAGEMENT: SMALL BUSINESSES CONTINUE TO WIN CONSTRUCTION CONTRACTS (2001).

appear to be little actual data on its extent and effect on small businesses.[188] GAO did recommend that the SBA Administrator establish a dependable bundling oversight strategy, but there is no guarantee this will be implemented soon.[189] The other important element in restricting improper bundling has been passage of the Small Business Reauthorization Act (SBRA) of 1997[190] and a significant number of GAO protests that have placed boundaries on the propriety of bundling. The SBRA stated a federal policy of avoiding "unnecessary and unjustified bundling" and provided specific guidance for documenting "measurably substantial benefits" derived from consolidation and garnering SBA participation in bundling decisions.[191]

The SBA implementing regulations and FAR provide detailed procedures to justify bundling, including quantifying the benefit of consolidating requirements.[192] Another notable element of the SBRA is that it allows SBA to file protests against proposed bundling at the agency level and protest level.[193] To further this accountability measure, SBA regulations invite individuals to report agency bundling actions.[194]

The Comptroller General has issued a series of decisions interpreting the "measurably substantial benefits" standard provided in the SBRA. In the most significant decisions, GAO upheld bundling as an acceptable response to downsizing and funding shortages. In *Phoenix Scientific*, the Comptroller General accepted the agency's rationale that it had consolidated requirements in an effort to cope with "significant reductions in its civilian work force, the unique requirements of maintaining an aging aircraft fleet and decreases in Air Force Funding."[195] The Comptroller General is taking a hard look and

188. GAO's analysis of information in the Federal Procurement Data System indicates that federal agencies did meet the governmentwide goal of 23 percent for prime contract awards to small businesses. The report explains the SBA Office of Advocacy used a larger universe of numbers to achieve its statistics. *See* GAO REP. No. GAO/GGD-00-82, *supra* note 187, at 2. When GAO conducted specific case studies, however, they resulted in findings that even where agencies consolidate work to the extent that small business participation might be limited, the agency often coordinates with the SBA to determine where small businesses could be accommodated. *See* GAO REP. No. GAO-01-746, *supra* note 187, at 22.

189. *See* GAO REP. No. GAO/GGD-00-82, *supra* note 187.

190. Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, 111 Stat. 2592 (1997).

191. 15 U.S.C. § 644 (e).

192. *See* FAR 7.107 (b).

193. *See* John Cibinic, *Contract Bundling: Another Update*, 15 NASH & CIBINIC REP. ¶ 51 (Apr. 2001).

194. *See id.*

195. Phoenix Scientific Corp., B-286817, Feb. 22, 2001, 2001 CPD ¶ 24. Other acceptable justifications for bundling include consolidation of utility services where the agency reasonably believes it will not receive competition for all requirements if solicited separately (Virginia Electric & Power Co., B-285209, Aug. 2, 2000, 2000 CPD ¶ 134); a decision is made to award several projects to only one contractor because of limited storage area (Malone Constr. Co., B-280021, Aug 18, 1998, 1998 U.S. Comp. Gen. LEXIS 283); the agency no longer had sufficient staff to award separate contracts (Advanced Elevator

considering as a mitigating factor agencies' efforts to ensure small business participation, such as reserving certain awards under a multiple award contract for small business.

The Senate Small Business Committee chairman has urged the Bush administration to develop stringent criteria for federal agencies to monitor the extent to which prime contractors offer subcontracting opportunities to small businesses. If Congress can identify and quantify the impact of bundling, the next step is to begin to devise alternative statutory strategies.[196] The same principles are relevant to refining the use of IDIQ contracting.

The good news is that individuals within the government contracting community are debating the issues of indefinite delivery contracting. Even if minds differ, for example, as to whether bundling has impacted small business, there is a sense of vigilance and voice. The private attorneys general are at work. There is hope for change when ideas can be distilled from a group of diverse-minded individuals. Challenges expand the mind and allow one to overcome bad habits on an individual level. They lead to a point where Contracting Officers make choices not out of belief or habit but by extending themselves and implementing shared ideas founded in public-service values. As a leader of this change, a Contracting Officer will never again doubt the value of his or her position on the acquisition team.

C. *The Contracting Officer's Relevance and the Profession's Future*

In addition to the need for a new agency-level regulatory fix and congressional attention, the acquisition workforce crisis must be addressed. In the aggregate, Congress and the agencies must right the imbalances in skills and experience caused by downsizing and stem the impending retirement exodus of baby-boomer contracting personnel. At the local level, balance must be achieved between discretion and accountability. The Contracting Officer and end user both must be educated to recognize the long-range costs of avoiding competition. The "acquisition team" referenced in FAR part 1 needs a strong "owner" figure in the HCA and a capable "manager" figure in the Contracting Officer.

Contracting Officers often sense they must prove themselves individually to overcome a secondary status and low expectations. These slights reflect the history of the Contracting Officer employment series, which at one time

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Servs., Inc., B-272340, B-272340.2, Sept. 26, 1996, 96–2 CPD ¶ 125); and the agency decides to bundle a systems integration contract because breaking the technical requirements into separate contracts puts the coordination responsibility on the Government, making it subject to claims (Phoenix Tech. Servs. Corp., B-274694.2, Mar. 12, 1997, 1997 U.S. Comp. Gen. LEXIS 409; Magnavox Electronic Systems, B-258037, Dec. 8, 1994, 94–2 CPD ¶ 227; Titan Dynamics Simulations, B-257559, Oct. 13, 1994, 94–2 CPD ¶ 139; Resource Consultants, Inc., B-255053, Feb. 1, 1994, 94–1 CPD ¶ 59.).

196. *See* Leroy H. Armes, *DoD Contract Consolidation Reduces Small Business Participation as Primes, Study Finds*, 75 Fed. Cont. Rep. (BNA) No. 18, at 446, 447 (May 1, 2001) (quoting Sen. Chris Bond (R-Mo.)).

was seen as a means of advancing one's federal government career out of the secretarial pool.[197] While Contracting Officers have campaigned for professional status and been empowered by shrinking regulations, senior agency procurement officials have failed to motivate and train them to be the team leaders they need to be.

Traditional professionals, such as doctors, lawyers, and teachers, must undergo several years of apprenticeship or internship before earning the full status of their occupation. The mentoring, questioning, and learning by example that comes from this process simply cannot be synopsized into a forty- or even eighty-hour contracting course. The toolbox of skills needed by Contracting Officers today include interpersonal communication, active listening, planning and organizing, decision making, persuasion, and leadership. These skills, all of which support the fundamental "business judgment" Contracting Officers must employ, can only come through experience and coaching.

The sense of secondary status among contracting personnel must be abolished. Dynamic leadership is needed to bring together the acquisition team and infuse it with a spirit of inclusiveness. When individuals work together toward a common goal, each adding value to the project, a sense of respect and confidence grows from within. The colleagues who come together as part of the acquisition team must include the program manager, Contracting Officer, technical experts, and legal and small business offices. Team learning among a group of individuals with diverse expertise creates a bond so that every member begins to feel important and valued.

This interdependent approach to learning provides an important aspect of professional training: the exposure to critical ideas. When a member of the small business office educates the program manager that setting aside work for small or small, disadvantaged businesses builds capable suppliers, a good industrial base, and benefits competition, that program manager is more likely to turn to his colleagues than to the contractor for trusted advice and direction. That program manager will be better capable, moreover, of explaining the acquisition process's guiding principles to the end user. Coordination through awareness-raising and active listening, as well as even more fundamental factors such as trust, can bring true empowerment to the acquisition team. Once a sense of trust and common goals is fostered, the diverse membership of the acquisition team can become something of a "collective ombudsman" to ensure effective competition as envisioned by FASA.

When an acquisition team establishes itself as a cohesive unit, it becomes the HCA's responsibility to give recognition and visibility to the group. The modern manager is expected to set the tone and has a major duty as team builder. This sense of clout and status, earned collectively rather than indi-

197. DAWIA specifically required the establishment of specified career paths for acquisition personnel that would allow individuals to rise to the highest level of the defense acquisition system. *See* 10 U.S.C. § 1734 (2001).

vidually, will allow the Contracting Officer to assert himself as a proud member of a professional organization.

The concept of acquisition team as internship, however, cannot take the place of improved, funded education for Contracting Officers. That education must build a business knowledge of the various markets from which the Contracting Officer buys on a regular basis. Regrettably, it appears policymakers are more willing to waive education requirements than fund and manage them. Section 808 of the 2001 Defense Authorization Act requires contract specialists in the GS-1102 series to have a bachelor's degree and at least twenty-four semesters of business-related coursework *regardless* of work experience.[198] Rather than invest in the future and send thousands of contract specialists back to school, the acting undersecretary of defense directed agency officials to apply the educational requirements only to new contracting personnel starting in their jobs after October 1, 2000. The guidance memorandum even suggests officials invoke the waiver provision in the original version of DAWIA to exempt new personnel entering the GS-1102 series between October 1, 2000, and March 21, 2001, from the stricter education standard.[199] This attitude is simply reckless. Experience has proven that the future of procurement reform depends on the quality of the acquisition workforce.

VII. Conclusion

Over the years since FASA "legitimized" indefinite delivery contracting, GAO audits, DoD IG reports, and Comptroller General decisions have identified numerous instances of Contracting Officers circumventing competition rules behind the scenes of task and delivery order contracts. The legitimacy of certain indefinite delivery contracting practices remains very much in question. Small businesses often are edged out of competitions and left without a bid protest remedy. Public confidence in government procurement practices suffers when transparency is limited and contractors lose faith in the system. Careful refinements that were never implemented (as the Section 800 Panel and Congress intended) are now essential to stem apparent abuses of Contracting Officer discretion. Agency leaders must define boundaries and reemphasize the significance of competition through the use of substantive agency guidance.

Most of the misuse associated with indefinite delivery contracting arises out of a widespread belief that the gaps in regulatory guidance equate to consent for circumventing full competition. Contracting Officers, entrusted with increased discretion, also are encumbered by disproportionately heavy

198. *See* Kellie Lunney, *Pentagon Says Contract Specialists Don't Have to Go Back to School*, Gov. Exec. Com Daily Briefing (April 4, 2001), *available at* http://www.govexec.com/dailyfed/0401/040401m1.htm.

199. *See* 10 U.S.C. § 1737(c) (2001).

workloads, which resulted from poorly managed workforce reductions. Increased pressure, in many cases, led to competition being traded for efficiency. All of this is far removed from the "streamlining" reformists intended to establish with empowerment and innovative contracting tools. To return procurement reform to its intended course, agencies must recognize the tremendous significance of human resources as well as the human tendency to seek and follow guidance.