



# COUNSEL COMMENTARY

## A CONTRACT TYPE CONUNDRUM

A recent case shows how contractors can use a pre-award bid protest to clarify solicitation ambiguities and avoid unacceptable risks during contract execution.



BY STEPHEN L. BACON

**C**ontractors are often wary of filing pre-award bid protests. They fear that challenging the terms of a solicitation will annoy or offend the agency decision-makers who are responsible for awarding the contract.

These concerns may be legitimate in some cases. However, that should not dissuade contractors from filing well-founded objections to a solicitation that is ambiguous, unduly restrictive, or inconsistent with applicable law or regulation. Pre-award protests are an essential tool to level the playing field. And they avoid the formation of contracts that are unclear and prone to post-award disputes.

A recent protest filed by General Dynamics Information Technology, Inc. (GDIT) at the Government Accountability Office (GAO) illustrates how contractors can effectively use the pre-award protest process. In this case, the agency failed to unambiguously identify the type of contract being solicited.

GDIT protested to obtain clarification regarding this key issue. It had significant implications for pricing and for determining how risk would

be allocated between the parties after award. Contractors should strongly consider a timely pre-award protest when, as in the GDIT protest, a solicitation does not clearly define material terms such as the type of contract being awarded.

### The Army's Solicitation

The solicitation at issue was a task order request for proposals issued by the Department of the Army under the Information Technology Enterprise Solutions-3 Services (ITES-3S) indefinite-delivery, indefinite-quantity (IDIQ) contract vehicle.

The Army requested proposals for information technology (IT) support services “to operate and maintain the Command and Control, Communications, Computers, and Information Management (C4IM) and Infrastructure Operations for Headquarters (HQ) United States (U.S.) Army Intelligence and Security Command (INSCOM).”

The selected contractor would be required to “provide subject matter experts necessary to provide support to maintain the C4IM of INSCOM’s local networks and corollary infrastructure.”

The solicitation contemplated the award of a firm-fixed price (FFP) level-of-effort (LOE) task order. The allocation of risk on a FFP LOE contract is fundamentally different than a traditional FFP contract.

Under an FFP contract, “the price is not subject to any adjustments on the basis of the contractor’s cost experience.” Thus, “full responsibility for all costs and resulting profit and loss associated with performing the required work is placed on the contractor.” But under an FFP LOE contract, “the government pays a fixed price for, and the contractor is obligated to provide, only a specified level of effort, identified and agreed upon in advance, over a specified time.”

FFP LOE contracts are generally appropriate for studies involving research and development or other situations in which “[t]he work required cannot otherwise be clearly defined.”

The solicitation required performance of various IT tasks by a specified number of full-time equivalents (FTE) in prescribed labor categories. In addition, the solicitation contained “performance thresholds” that had to be satisfied to achieve an “Acceptable Quality Level”

for the required IT tasks.

The Army stated that “[t]he contractor shall provide the level of support” established in the solicitation. This suggested that it need only provide the required number of hours. In response to questions from offerors, however, the Army characterized the hours as estimates that would operate as a “ceiling.” The Army also indicated that any “unused” hours from one task order period could be utilized in a subsequent period.

GDIT filed a protest at the Government Accountability Office (GAO) prior to the deadline set for receipt of proposals. GDIT challenged the solicitation on two primary grounds.

First, GDIT argued that the

contemplated task order was outside the scope of the underlying ITES-3S contract. Second, GDIT argued that the solicitation was patently ambiguous regarding the type of contract at issue and violated regulations applicable to FFP LOE term-type contracts.

### ITES-3S Contract Scope

As an initial matter, GDIT argued that the Army could not award an FFP LOE task order because that type of task order was not permitted under the terms of the ITES-3S contract. GDIT’s position was based on a statement in the ITES-3S contract that states, “task orders may be firm-fixed-price, time-and-materials, and/or cost-reimbursable in nature.”

Based on this language, GDIT asserted that the solicitation was

inconsistent with the terms of the underlying ITES-3S contract and therefore outside its scope. In response, the Army argued that an FFP LOE “order is simply a form of firm-fixed-price order.”

Moreover, the Army emphasized that its use of the phrase “in nature” indicated that agencies could issue any type of FFP order including FFP LOE orders.

GAO agreed with the Army “that the ITES-3S IDIQ contract language is broad enough to encompass issuance of all types of firm-fixed-price task orders, of which a firm-fixed-price, LOE term task order is one.” Further, GAO determined that the ITES-3S contract language was sufficient to “advise offerors of the potential for the type of task order at issue here.”



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Accordingly, GAO denied GDIT’s allegation that the solicited task order was outside the scope of the underlying ITES-3S contract.

**Contract Type Ambiguity**

Agencies generally have discretion to select an appropriate contract type. In this case, however, GAO sustained GDIT’s protest allegation that the solicitation was patently ambiguous as to the type of contract at issue. And further, it violated applicable regulatory requirements for an FFP LOE term type of contract.

GDIT maintained that the solicitation was “ambiguous as to whether it establishes a fixed level of effort.” GAO agreed due to a conflict between the solicitation’s terms and the Army’s responses to questions from offerors

regarding whether the number of hours would be fixed.

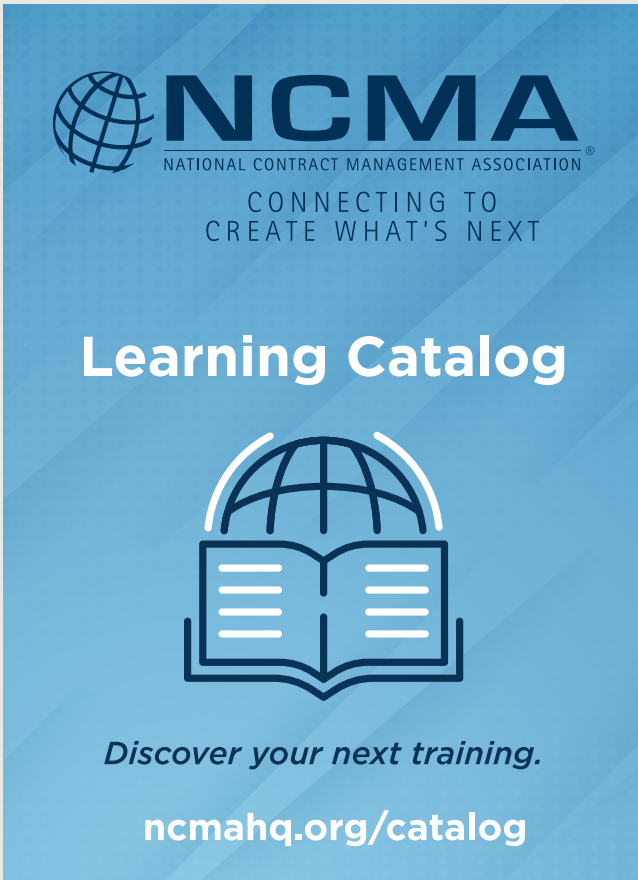
As GAO explained, “a firm-fixed-price, LOE term type of contract requires there be a specified level of effort (e.g., labor hours) over a specified period of time (i.e., performance period) agreed to in advance.” But the Army made several statements that “contradict[ed] the requirement for a fixed level of effort by characterizing the hours as only yearly estimates.”

For example, the Army expressly stated that “[t]he Government would not be held to a set amount of hours annually.” The Army also explained that “each ordering year is set at a level of effort ceiling of 950,279 hours, [but this] yearly projection [was] subject to change throughout the life of the contract.”

GAO opined that the Army’s statement “establishing an estimated ceiling for the number of labor hours conflicts with the FAR’s requirement for an identified and agreed upon level of effort for a firm-fixed-price, LOE contract type.”


The Army’s responses also rendered the solicitation patently ambiguous “as to whether there are a fixed number of labor hours that must be performed in each performance period or whether the number of labor hours in the solicitation serves as an estimate and ceiling.”

GAO determined that the ambiguous solicitation “prejudiced potential offerors because they were not able to compete intelligently and on a relative equal basis.” GAO recommended that the Army “unambiguously



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indicate the type of task order contemplated” and, if it chooses an FFP LOE term contract type, it should “specify the fixed level of effort the successful offeror will be required to perform.”

### Conclusion

The contract type selected in a solicitation is a fundamental assumption that determines risk allocation. GDIT understandably protested the ambiguous solicitation in this case. It had to ensure that it understood the appropriate risk allocation before submitting its proposal.

If GDIT had not protested, the agency could have argued after award that GDIT was required to complete all required IT tasks even if it needed more hours than specified in the solicitation. GDIT’s protest is an example of using

the pre-award protest process to mitigate the risk of disputes that can materialize after award.

The ambiguity concerning contract type also likely had significant implications for pricing. Competitors may have proposed very different labor rates depending on whether the task order was FFP or a true FFP LOE term-type contract. Protesting the solicitation ensured that all offerors would prepare their prices based on the same basic risk assumptions.

Contractors should not be shy about using the pre-award protest process when they are faced with ambiguous solicitation terms or conflicting statements from the agency in response to questions. A failure to protest in this situation creates unnecessary risk and

may harm the contractor’s competitive position. **CM**

*The views expressed in this article are those of the authors and do not necessarily reflect the views of Rogers Joseph O’Donnell or its clients. This article is for general information purposes and is not intended to be and should not be construed as legal advice.*

**Stephen L. Bacon** is a shareholder in the Washington, DC office of the law firm Rogers Joseph O’Donnell, where he represents government contractors in bid protests, claims, investigations, and suspension and debarment proceedings. He frequently litigates cases at the Court of Federal Claims, the Government Accountability Office, the Boards of Contract Appeals, and the Small Business Administration’s Office of Hearings and Appeals. He also provides advice and counsel to clients on a broad range of contractual and regulatory compliance issues that confront government contractors.

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# The Crucial Role of Procurement Preparedness:

## Supporting Humanitarian Assistance and Disaster Response

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In times of crisis, the ability of federal, state and local government agencies to respond swiftly and effectively is crucial. While emergency disaster preparedness encompasses various aspects, one often overlooked component is procurement preparedness. Establishing robust procurement processes and frameworks is essential for public sector agencies to acquire the necessary goods and services promptly during emergencies.

### Understanding Procurement Preparedness

Procurement preparedness involves strategic planning and readiness within public sector agencies to procure goods and services efficiently related to Humanitarian Assistance and Disaster (HADR). It encompasses establishing frameworks, systems, and partnerships that allow agencies to access necessary resources swiftly while maintaining transparency and streamlining procurement processes. Here's why procurement preparedness is essential for public sector agencies:

#### **Swift Response:**

In times of crisis, time is of the essence. Adequate procurement preparedness ensures that agencies promptly respond by procuring essential supplies, such

as medical supplies, communication equipment, food, water, and other critical resources, without unnecessary delays. Being prepared minimizes administrative hurdles and enables agencies to address urgent needs promptly.

#### **Resource Optimization:**

Disasters often lead to increased demand and potential price increases for essential resources. By embracing procurement preparedness, agencies can establish budgets, develop supplier networks, and engage in bulk purchasing arrangements in advance. This proactive approach optimizes resource allocation, helps control costs, and avoids unnecessary competition for scarce resources.

#### **Federal Micro-Purchases for Contingency Contracting:**

Micro-purchases, as defined under FAR 2.101, allow federal agencies to procure goods and services up to a specific dollar threshold (currently \$10,000) without requiring competitive bids. During emergencies, this process becomes particularly valuable, enabling agencies to procure necessary supplies from qualified sellers. Micro-purchases eliminate red tape and expedite the procurement process, facilitating rapid response efforts.

### **Transparency and Accountability:**

Maintaining transparency in procurement processes is crucial for government agencies, especially during emergencies. By establishing clear guidelines, ensuring documentation, and incorporating appropriate oversight mechanisms, agencies uphold public trust and prevent any perception of impropriety. A transparent procurement system also promotes accountability and reduces the risk of fraud or corruption.

## **Best Practices for Procurement Preparedness**

To enhance procurement preparedness and maximize the benefits of micro-purchases for contingency contracting, agencies can adopt the following best practices:

### **Comprehensive Planning:**

Develop comprehensive procurement plans tailored explicitly to HADR scenarios. These plans should include clear roles and responsibilities, establish a framework for decision-making, and outline the necessary steps for expedited procurement processes during emergencies.

### **Prequalified Supplier Pool:**

Maintain an up-to-date database of prequalified suppliers who can provide critical goods and services during emergencies. This ensures that agencies can access a list of vetted vendors who can be quickly engaged during a crisis.

### **Develop Contingency Plans:**

Create contingency plans that address potential disruptions in supply chains during emergencies. Identify alternative sources of supply and establish agreements with backup suppliers to ensure the continuity of critical resources. These plans should account for various disaster scenarios and outline alternative procurement methods when standard processes are not feasible.

### **Technology Integration:**

Leverage technology to streamline procurement processes and facilitate transparency. Implement e-procurement systems, with integrations into partners like Amazon Business, that enable competitive pricing, track

and monitor purchasing patterns, and efficiently manage your cashflow. Automation reduces administrative burdens, ensures accuracy, and improves the speed of procurement operations and audit readiness.

### **Collaborative Partnerships:**

Establish partnerships and collaborations with other government agencies, private sector entities, and nonprofit organizations. These relationships foster information sharing, resource pooling, and coordinated efforts during emergencies. Collaborative partnerships enhance the overall resilience and effectiveness of disaster response and recovery operations.

### **Monitoring and Evaluation:**

Regularly evaluate the effectiveness of procurement processes and emergency response efforts. Analyze data and feedback to identify areas for improvement and implement necessary adjustments. Continuous monitoring and evaluation help optimize procurement practices, enhance preparedness, and drive efficiency in future emergencies.

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