

## FEATURED ARTICLE

### “FAR 16.505 Ordering - Understanding Streamlined Acquisitions”

#### Interview with Director of Acquisition Operations for the Regional Clients team, Robert Vitelli

By Mini Bruce

##### **Introduction:**

The Enterprise GWAC Acquisition Division has long been an outspoken advocate in the use of streamlined acquisition processes. Recently ASI Government published an Advisory entitled “Streamlining Task and Delivery Order Contracts under MA/IDIQ Contracts.” This advisory offered ideas for streamlined approaches that can be used at the order level to leverage the flexibilities offered by FAR subpart 16.5 while avoiding the complex procedures of FAR subpart 15.3. This Advisory points out several key concepts and offers “Food for Thought” on possible approaches to use at the Order level. We consider this a great start to thinking through the FAR 16.5 process. For those that maybe interested in viewing this Advisory please feel free to contact us for a copy.

As the Advisory points out the FAR offers considerable flexibility to the Contracting Officer (CO) to fashion his or her own order placement procedures while encouraging the use of streamlined techniques but offers only general guidance. We strongly believe that streamlining concepts and methodologies should be embraced as an ultimate win for both the Government and the Contractor saving time, cost, and resources for both Government and Industry.

Remember there is no one size fits all - each acquisition should be viewed through its own prism however that does not mean agencies cannot develop basic approaches using streamlined techniques. We understand the need for sharing best practices and understanding what others may be doing in this area. To that end we will attempt to share with our Alliant 1102 community some of the techniques employed by our customers and sister organizations. In this article we will be speaking to Mr. Bob Vitelli, Region 3 GSA Director of Acquisition Operations for Regional Clients, Assisted Acquisitions. Bob was an early advocate and pioneer in developing streamlined processes in support of their diverse customer base.

##### **Interview Questions:**

***Can you describe your approach(s) to FAR 16.505 streamlining? How did you go about developing your streamlined Approach? How were the contractors evaluated?***

The approach begins with a fundamental understanding of what FAR 16.505 is all about. One word differentiates this part of the FAR from FAR Subpart 15.3. That word is ordering. There is a parent contract that already is in existence with contractors who are already qualified to do the work. A CO simply needs to do an order under the contract and not set up a formal competition as if placing a new contract. The order process gets done through something called Fair Opportunity. As defined by the FAR, Fair Opportunity simply means to provide each awardee a fair opportunity to be considered for each order exceeding \$3,500 issued under multiple delivery-order or multiple task order contracts. That’s it.

The streamlined approach was developed around the additional concepts that fall under 16.505, the CO has broad discretion to develop the appropriate order placement procedures, and competition requirements in FAR part 6 and policies in FAR subpart 15.3 do not apply. Thus, freed up from these strict and heavily procedural based parts of the FAR, we at Region 3 developed an approach that enabled the CO to set up the ordering procedures from within FAR 16.505 and allowing the CO to stay within 16.505 throughout the process.

The approach developed centers around a concept known as best suited. That is, after soliciting the contractors for the needed information through a Fair Opportunity Notice (FON), what contractor is best suited for the CO and acquisition team to set up an order with?

The Fair Opportunity Notice captures the simple guidelines noted in FAR Part 16.505 (official notice, statement of requirements, reasonable response period, disclosure of factors, including weights and importance) a sufficiently detailed narrative that can justify an award decision and opportunity for debriefing for Orders exceeding \$5.5M should a Contractor request one.

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The evaluation happens through a simple comparative analysis of the information, among the contractors who submitted information through the factors outlined in the FON. Price and/or Cost must always be considered. After this analysis is completed and documented, the CO determines the best suited contractor with whom to set up an order. Note that the FON should specifically state that a comparative analysis will be made to determine the best suited contractor considering all factors and price/cost. Once that best suited determination is made, the CO can either issue an award or settle final terms and conditions with the best suited contractor, including any technical or price topics. If final terms and conditions cannot be reached with the best suited contractor, then the CO can move on and determine the next best suited contractor from the original submissions.

Note, most of the time, an award can be made right after the analysis stage or when very little remains to set final terms and conditions.

***Have you developed an iterative approach to handle all requirements or do you have multiple approaches depending on the requirement?***

The approach described above is the core one used for the four acquisitions that we have done.

***Can you describe a couple of these approaches to us?***

The approach is as stated above. There can be variations as to how the best suited analysis is documented, depending on the acquisition team that does it, but the same core approach and principles apply.

***Have you implemented these approaches under Alliant?***

Yes, we implemented these approaches under Alliant and under GSA Schedule. The versions done under Alliant were more refined in the language used in the FON.

***Could you give us an example of one Task Order requirement that has been successful for the region?***

Yes, one example was a requirement done for the Defense Health Agency called Processing Operations Reporting Tracking Solution for their Service Treatment Records. This was a requirement awarded for a one year base period and plus three year option periods to validate, integrate, and deploy a COTS ECM solution, as a pilot program. The COTS ECM solution needs to be configured to support the STR distributed business workflow and allow for efficient and effective transmission, tracking, and reporting to support claims adjudication.

***How did you evaluate the Offerors?***

The evaluation was the same as was described above using a comparative analysis among the contractors who submitted information in response to the FON.

***Can you describe the documentation process under the Task Order that was used? How is this different from a full and open FAR 15.3 process?***

The documentation process in Region 3 is always streamlined and we have been doing this since 2007. It starts first with using the fewest documents within the solicitation package as is possible. It follows through with documents that are clear, concise and well written so that all contractors understand the same thing at the same time. This is especially true with the PWS and the FON. The FON only includes the technical factors needed to distinguish one contractor from another, the main difference is that documentation is written to engage only the language of FAR part 16.505 and reflects the Fair Opportunity process associated with Ordering from a parent contract

This flexible FAR 16.505 approach is diametrically opposed to the strict, formal competitive process of a negotiated procurement that reflects Source Selection under FAR subpart 15.3. Remember that these two parts of the FAR do different things, thus were designed it to be different. If FAR subpart 16.505 wasn't different, why would it even exist in the first place?

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### ***Does the streamlined approach save time, money and/or resources?***

We have found that it does. Of course acquisition teams will have different experiences depending on how well they execute the process so results may differ. The largest savings in the three things you mentioned above comes from cost avoidance under all three. When an acquisition team can avoid the formal processes of FAR subpart 15.3 and replace that with the informal processes of Fair Opportunity, high costs associated with formal, strict and complicated procedures are reduced. For example: the time and cost associated with formal discussions is saved. The chances of a protest are reduced in view of a more simplified procedure as opposed to a more formal one under FAR subpart 15.3. That is, fewer places to make a mistake and fewer places for legal wrangling. Another example is that the Debrief process is much better. In our opinion it is easier to explain why a contractor was not determined to be the best suited as opposed to explaining why a contractor was not given an award under a formal source selection.

### ***Is there case law you can cite that helped you develop your approach?***

Again, the development of the approach we use came first from understanding the principle of Fair Opportunity and recognizing the difference between that and formal Source Selection under contracting by negotiation in FAR subpart 15.3. Before we talk about the GAO and Case Law, let's first take a look at what supports Fair Opportunity. The following apply:

1. FAR subpart 16.505 Ordering supports and explains Fair Opportunity
2. The parent contract ordering procedures, such as GSA Alliant and Oasis, and other multiple-award contracts like them, encourage following FAR 16.505 and discourage FAR subpart 15.3.
3. The law that is known as FASA, Federal Acquisition Streamlining Act, which gave rise to Task Order contracting, led to the Fair Opportunity procedures we know today
4. The GAO knows and recognizes the differences between FAR subparts 15.3, 16.505 and even 8.404. More about the GAO below:

The GAO totally recognizes the differences between the FAR subparts noted above and often states this in a certain way in multiple cases as noted below. GAO often states that while it is well recognized that IDIQ task order contracting is subject to the provisions of FAR subpart 16.505, agencies that conduct such task order contracting as if they were negotiated procurements will be judged using those standards. Here are some quotes directly from the GAO with regard to this:

"As noted above, this procurement was conducted as a competition between IDIQ contract holders and, as such, was subject to the provisions of FAR § 16.505... Where, as here, an agency conducts a task order competition as a negotiated procurement, our analysis regarding fairness will, in large subpart, reflect the standards applicable to negotiated procurements."

"However, FAR subpart 16.5 expressly provides that the competition requirements of FAR Part 6 and the policies in subpart 15.3 do not apply to the ordering process involving ID/IQ contracts. FAR sect. 16.505(b) (1) (ii) Although the protesters argue that excluding the "policies" of FAR subpart 15.3 does not prohibit the import of the "procedures" set forth in those provisions, we conclude that FAR subpart 15.3 procedures do not, as a general rule, govern task and delivery order competitions conducted under FAR subpart 16.5. Instead, we will review task order competitions to ensure that the competition is conducted in accordance with the solicitation and applicable procurement laws and regulations"

So in other words, if you are conducting a FAR subpart 16.505 buy but you use the processes and procedures of FAR subpart 15.3, the GAO will hold you to FAR subpart 15.3. In our approach above, we seek to set up the buy in FAR subpart 16.505 and to stay there throughout the process.

We are unaware of any cases with regard to the exact procedure that I mentioned above because we have had no protests with it.

### ***What are the problems and pitfalls of this process?***

We are highly confident in our understanding of the principles of Ordering from IDIQs using Fair Opportunity because it is FAR based and supported by the ordering procedures of the parent IDIQ contract. Additionally, GAO also notes the differences in related case law and all of this arises out of FASA as noted above.

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The only pitfall that we are aware of and remain unsure of is that in our endeavor to stay out of FAR part 15, we state clearly in the FON that after we determine and document the best suited contractor from the original submissions we may set the final terms and conditions of the order with that contractor, if needed at all. In setting such final terms we can speak about any topic, including technical and/or price. By doing this we are following the procedures of our own solicitation, as the GAO always recommends, but would the GAO also consider this a discussion?



What are the best practices for developing a streamlined acquisition approach at the Task Order Level?

- ~Use as few documents as possible in the entire solicitation.
- ~ Write documents that are clear, concise and to the point, only including what is needed in each document
- ~In the RFQ, RFP or FON, use as few technical evaluation factors as possible and only those that will truly discriminate between the contractors.
- ~In FAR part 8.404 and 16.505 buys, do not set up procedures that reflect FAR subpart 15.3 because that's where you will be judged by the GAO in a protest.
- ~Remember that Ordering under FAR subpart 16.505 is totally different than contracting by negotiation under FAR subpart 15.3 Source Selection. At the end of a pure 16.505 buy, the COs responsibility is to ensure that all contract awardees received a Fair Opportunity and not a formal competition.
- ~Stay in the part of the FAR that you started in
- ~Lastly, be certain and remember that no matter what part of the FAR you are under and what procedures you are using, you are always required to do these five things per the GAO who reminds CO over and over again. No worries, well-trained COs do these anyway as follows:
  1. Do what you said you were going to do in the solicitation
  2. Do not break a law or regulation
  3. Fully document the award decision
  4. Reach reasonable conclusions in the evaluation and award decision
  5. Be fair to all contractors (no bias)

**Do not violate any one of these. If you do, the problem isn't because of streamlining.**

### Summary:

The GSA GWAC Division would like to thank Mr. Robert Vitelli and Region 3 for sharing their streamlined ordering methodology with us. This discussion allows us to continue the dialog on "What a Streamlined Task Order Acquisition may look like?"

Region 3's Fair Opportunity Approach is one of many possible approaches. As stated earlier the CO has broad discretion in developing task order methodologies and techniques when establishing "Fair Opportunity" procedures for individual Task Orders. For COs the key take away is "Fair Opportunity" must always be adhered too when establishing Task Order procedures. And remember one size does not fit all. For further information on FAR 16.5 streamlined Ordering please contact Mimi Bruce Director of Contracting Support for Alliant at [mimi.bruce@gsa.gov](mailto:mimi.bruce@gsa.gov).