

Multiple-Award Gov't Contracts Raise Stakes For Contractors

By **Daniel Wilson**

Law360, Nashville (June 27, 2016, 2:14 PM ET) -- A growing shift in federal procurement has seen agencies increasingly move away from discrete individual contracts toward long-term, multiple-award deals, attorneys said, a trend contractors need to be aware of to ensure they aren't left out in the cold.

There has been a clear increase in the use of multiple-award deals by federal agencies, several attorneys claimed, especially since the passage of the Budget Control Act — introducing the constantly looming threat of the federal sequester.

"We're seeing a shift away from single award-type contracts to longer-term [indefinite-delivery, indefinite-quantity] contracts," Blank Rome LLP partner David Yang said. "It does make sense for the government for a lot of reasons."

There are several factors that are likely behind the perceived shift, with a range of claimed benefits for the government in the use of long-term, multiple-award deals, such as the ability to avoid having to craft hundreds of contract proposals each year, saving time and resources, attorneys noted.

These deals, which are being heavily pushed by the White House Office of Management and Budget, also allow many vendors to compete for task orders under a single contract, offering the potential of driving prices down, they claimed.

And with a federal budget environment still in flux, kept away from a return to the austerity of the federal sequester imposed by the Budget Control Act only through a series of temporary budget deals, IDIQ procurements also offer agencies the flexibility to adjust their purchases based on their available budget without breaking contract terms, they said.

There could also be a number of agency-specific reasons for the use of multiple-award deals, attorneys noted. For instance, the single largest contracting agency, the U.S. Department of Defense, is coming off a wartime footing, with the Iraq War having ended several years ago and operations now winding down in Afghanistan.

Single-award deals often make sense in a wartime environment, where the military's needs are either very specific or have to be rapidly met, counting against the use of a competitive process. But contracting outside of wartime necessitates a closer look at the dollars and cents.

"For all of these reasons, we're going to keep seeing the use of commercial item-influenced [or] -based

IDIQs for the foreseeable future, because it gives the government and agencies a lot of flexibility, especially when budgets are uncertain," Yang said.

While long-term, multiple-award deals can clearly work to the benefit of the government — even if not always appropriately used, such as in instances of procurements of rapidly-evolving technology — they are not nearly as beneficial to contractors, attorneys said.

Each contract award may offer several opportunities for becoming part of a deal, but the shift to long-term, multiple-award deals also means there are less contracting opportunities overall to be a part of, they noted.

And as multiple-award contracts are typically long-term deals, failing to secure a place in an IDIQ contract, consolidated contract or other multiple-award vehicle can leave a contractor out in the cold for as much as a decade at a time, making it harder to be a profitable government contracting business, according to several attorneys.

"If you don't get your ticket to play, if you don't have at least an opportunity to be within the smaller group that are bidding, you could be frozen out of the work," Covington & Burling LLP partner Susan Cassidy said.

Even if a contractor manages to secure a seat at the table under an IDIQ deal, this often just means their burden has shifted from securing a winner-take-all, single-award deal to trying to secure task orders under the overarching contract, attorneys noted.

Small businesses in particular are struggling the most to cope with the new contracting landscape, with reports that many are being driven out of the government contracting space — or out of business altogether — even as agencies tout high small business participation rates in federal contracting, said Crowell & Moring LLP partner Robert Burton, a former deputy and acting administrator of the Office of Federal Procurement Policy.

For instance, small businesses have to put considerable resources into contract bids, requiring them to be more selective in their bidding targets, and often do not have the same capacity to bounce back from exclusion from a multiple-award deal that larger companies have.

Also, individual task orders made under IDIQ deals are only able to be challenged through a bid protest before the U.S. Government Accountability Office if they're worth more than \$10 million, a space that many small businesses simply don't operate in, attorneys noted.

"I remember when the \$10 million threshold was put in place ... it was really meant to be somewhat of a pilot," Burton said. "We now can see that it probably was too high, especially in view of the trend to award so much vis-a-vis the task orders now. I think they need to lower the threshold and I think they need to give a full debriefing [to companies that didn't win] on task order procurements."

With these high stakes, it is more important than ever for contractors to get the basics right in their bids, making sure they are diligent about conforming to exactly what the contracting agency wants, both in technical and cost requirements, at the initial contracting stage and at the time of bidding on each task order, attorneys claimed.

"Contractors need to understand what they're bidding on, and knowing [their] customer," Cassidy said.

"That's actually the best way to win [a deal] — knowing the customer and knowing what they want."

It can often be useful for contractors to take a haircut on their expected returns from orders under an IDIQ contract, Yang said. While an agency may state that it is making an award on a best-value basis, and not simply picking the lowest-priced, technically acceptable bid, being the lowest-priced bidder can still carry considerable weight, he noted.

"I think that the reality is that the government is really moving towards — even though they don't say it — but the way that they evaluate bids and select awards is really based more on price than, say, your technical solution, especially when it comes to commercial items," Yang said. "I think that a lot of contractors need to sharpen their pricing and understand that the market has changed and that they're not going to be able to realize the same level of profits that they used to."

--Editing by Katherine Rautenberg and Kelly Duncan.

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