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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Library of Congress—Obligation of Guaranteed Minimums for Indefinite-Delivery, Indefinite-Quantity Contracts under the FEDLINK Program

File: B-318046

Date: July 7, 2009

DIGEST

The Library of Congress uses indefinite-delivery, indefinite-quantity (IDIQ) contracts, against which agencies place orders for library and information products and services, in support of its Federal Library and Information Network (FEDLINK). FEDLINK is a voluntary program, and the Library states that it cannot accurately anticipate use of an IDIQ contract. The Library proposes using a standard amount of \$500 as the guaranteed minimum for these contracts regardless of the maximum ordering limitations or total contract value, which amount would be obligated at the time it awards the IDIQ contract. To provide adequate consideration for a binding IDIQ contract, an agency must establish a guaranteed minimum that is more than a nominal amount and reflects the amount the agency is fairly certain to order. In the absence of reliable historical data indicating that a \$500 guaranteed minimum for a particular IDIQ contract is too high or too low, we have no basis to object to the use of \$500 as a guaranteed minimum.

DECISION

The General Counsel of the Library of Congress (Library) requested a decision on the proper obligation of funds for indefinite-delivery, indefinite-quantity (IDIQ) contracts for use by federal agencies participating in the Library's Federal Library and Information Network (FEDLINK) revolving fund program. Letter from Elizabeth A. Pugh, General Counsel, Library of Congress, to Gary Kepplinger, General Counsel, GAO, Mar. 31, 2009 (Request Letter).¹ Specifically, the Library seeks guidance on the

¹ Our practice when rendering decisions is to obtain the views of the relevant agency to establish a factual record and the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*,

(continued...)

proper estimation of amounts to be obligated as the guaranteed minimums under centralized IDIQ contracts against which various federal organizations place orders. The Library asks whether a standard amount of \$500 could be used as the guaranteed minimum for these contracts regardless of the maximum ordering limitations or total contract value. Also, the Library seeks our views on the use of other contract vehicles—such as basic ordering agreements and requirements contracts—in the context of the FEDLINK program.

As we explain below, to provide adequate consideration for a binding IDIQ contract, an agency must establish a guaranteed minimum that is more than a nominal amount and reflects the amount the agency is fairly certain to order. The Library should review available historical usage data for the item or service being purchased to ensure that \$500 is a reasonable estimate of the amount that is fairly certain to be purchased through each IDIQ contract. However, in the absence of reliable historical data, we have no basis to object to the use of \$500 as the guaranteed minimum. Although we are not stating views on the use of the different contract vehicles, we are providing some information on the three types of vehicles raised in the request letter.

BACKGROUND

The Library operates the FEDLINK intragovernmental revolving fund pursuant to 2 U.S.C. § 182c. FEDLINK is a cooperative procurement, accounting, and training program designed to provide access to online databases (*e.g.*, Lexis-Nexis, Westlaw, Dun and Bradstreet), periodical subscriptions, books, services to repair and preserve library material, and other library and information support services available from commercial suppliers. 2 U.S.C. § 182c(f)(1). Through FEDLINK, the Library develops technical specifications and statements of work for these electronic and print information services, conducts formal negotiated procurements, evaluates contractor proposals, and establishes IDIQ contracts or basic ordering agreements with multiple vendors.² Although not required to do so, federal agencies and other organizations entitled to use federal sources of supply may place orders for these products and services with FEDLINK and thus are able to take advantage of volume discounts, which can be as high as 50 percent off commercial rates.³ The total amount purchased through the various procurement vehicles ranges from \$1,000 per year to as much as \$15.8 million; a few procurement vehicles have no orders; and individual orders range from approximately \$500 to \$1.9 million. Request Letter.

(...continued)

GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. In this case the General Counsel fully articulated the agency's views in the request letter.

² See *Ten Reasons to Use FEDLINK*, *available at* www.loc.gov/flicc/fedlink/10reasons.html (last visited June 5, 2009).

³ *Id.*

Before the FEDLINK revolving fund was established in 2 U.S.C. § 182c, the Library operated FEDLINK under the Economy Act, 31 U.S.C. § 1535. At that time the Library would establish basic ordering agreements (BOAs) with qualified vendors pursuant to the Federal Acquisition Regulation (FAR), at § 16.703.⁴ The BOAs would set forth technical requirements, fix pricing and discounts, and include administrative requirements and standard FAR contract clauses. Request Letter. After signing annual interagency agreements with its customer agencies, the Library would synopsise customer requirements for particular services, review offers received, and place orders referencing the appropriate BOAs. *Id.* In this manner the Library established agreements with vendors but did not incur any obligation when it established the BOAs; obligations were only incurred and recorded when customer-specific orders were issued, which protected the government from liability should orders for specific items or services not arise. *Id.*

However, the Library and its FEDLINK customer agencies found using BOAs was administratively burdensome because of the additional competition requirements for placing orders against agreements and the potential for renegotiation of terms. *Id.*, *citing* FAR § 16.703(d). The Library also believed that by using contracts instead of BOAs it would be able to secure better pricing and discounts for the government and streamline the process. As a result, when the revolving fund was established in 2 U.S.C. § 182c, the Library began using IDIQ contracts in some situations.⁵ The Library stated that, in using FEDLINK IDIQ contracts, orders against an established IDIQ contract do not require additional notice and competition because the IDIQ contract itself is established competitively.⁶ Request Letter.

To establish a binding IDIQ contract, the FAR requires that there be a stated guaranteed minimum quantity of supplies or services to be ordered under the IDIQ

⁴ Although, as a legislative branch agency, the Library is not subject to the FAR, for the FEDLINK program the Library follows the FAR as a service to FEDLINK customers, most of whom are executive agencies subject to the FAR. *See Authority and Eligibility for the FEDLINK Program, available at www.loc.gov/flicc/fedlink/auth_elig.html* (last visited June 5, 2009).

⁵ BOAs are still used where FEDLINK has no history with a vendor and obligating against the FEDLINK reserve in anticipation of unknown customer requirements would place a significant risk on FEDLINK. Request Letter.

⁶ The FAR states that contracting officers “to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources.” FAR § 16.504(c). (Exceptions are set out in section 16.504(c)(ii)(B).) In addition, the FAR requires contracting officers, under a multiple-award IDIQ contract, to provide each vendor “a fair opportunity to be considered for each order exceeding \$3,000.” FAR § 16.505(b)(1). Additional competition requirements apply for orders exceeding \$5 million. FAR § 16.505(b)(1)(iii).

contract, FAR § 16.504(a)(1), and this amount must be obligated at the time the contract is awarded. B-308969, May 31, 2007; B-302358, Dec. 27, 2004. This requirement has proven problematic for the Library in implementing the FEDLINK program since there is a range in the value of its contracts and the annual requirements of the program's customers vary. Request Letter. Also, since the Library records obligations for the FEDLINK IDIQ contract minimums against the administrative reserves in the FEDLINK revolving fund, the Library finds itself in the difficult position of having to establish IDIQ contract minimums that meet the legal requirements without accumulating excessive obligations that might jeopardize the program's financial stability. *Id.* To remedy this concern, the Library proposes to use a flat amount of \$500 as the guaranteed minimum amount for its FEDLINK IDIQ contracts. *Id.* The Library also asks whether the FEDLINK program could use requirements contracts as described in FAR § 16.503(a), which do not require guaranteed minimums that must be obligated at the time of award.

DISCUSSION

IDIQ Contract Minimum Quantity Guarantee

An agency may use an IDIQ contract where the government cannot predetermine, above a specified minimum, the precise quantity of supplies or services that will be required during the contract period and where it is inadvisable for the government to commit itself for more than a minimum quantity. FAR § 16.504(b). An IDIQ contract must require the government to order and the contractor to furnish at least a stated minimum quantity of supplies or services, and if ordered, the contractor to furnish any additional quantities, not to exceed the stated maximum. FAR § 16.504(a)(1). To ensure the contract is binding, the minimum quantity must be more than a nominal quantity but, to avoid an unjustified commitment of agency funds, should not exceed the amount the government is fairly certain to order. FAR § 16.504(a)(2).

From an appropriations standpoint, an agency must record an obligation against its appropriation at the time that it incurs a legal liability, such as when the agency signs a contract committing the government to purchase a specified amount of goods or services. B-116795, June 18, 1954. *See also* B-300480.2, June 6, 2003, at 3 n.1. In the case of an IDIQ contract, the agency must record an obligation in the amount of the guaranteed minimum at the time the contract is executed because, at that point, the government has a fixed liability for the minimum amount to which it committed itself. B-308969, May 31, 2007; B-302358, Dec. 27, 2004. A valid obligation must reflect a *bona fide* need at the time the obligation is incurred. Thus the agency must have a *bona fide* need for the guaranteed minimum. *See* B-317636, Apr. 21, 2009; B-308969, May 31, 2007.

Since the agency incurs a recordable legal liability in the amount of the guaranteed minimum at the time at which it awards the contract, determining that minimum quantity is an important step in the execution of an IDIQ contract. While an agency may exercise its discretion in setting the guaranteed minimum in an IDIQ contract, this discretion is not unlimited. The stated minimum quantity forms the

consideration for the contract,⁷ and the FAR requires that the minimum quantity be more than a nominal amount. FAR § 16.504(a)(2).

The determination of whether a stated minimum quantity is nominal must consider the nature of the acquisition as a whole. For example, in a case involving IDIQ contracts for an agency's travel agent services, GAO concluded that a \$2,500 guaranteed minimum provided adequate consideration. B-295530, Mar. 7, 2005, *reconsideration denied*, B-295530.2 *et al.*, July 25, 2005. The solicitation had specified that while the guaranteed minimum would be \$2,500, the estimated minimum order would be \$15,000,000 and the maximum order would be \$150,000,000. We stated that "[t]here is no 'magic number' that the FAR or our decisions set as adequate consideration for a contract." *Id.* at 2. The agency established the \$2,500 minimum based on its review of minimums in other travel-related contracts which had transaction fees ranging from \$5 to \$16, so the \$2,500 guaranteed minimum here could represent up to several hundred transactions. We stated also that a contract's guaranteed minimum need not have a specific relationship to the estimated minimum order amount; rather, the guaranteed minimum must be evaluated in the context of all the specific facts and circumstances of the procurement. *Id.* In this case, the \$2,500, representing the amount to which the government was willing to commit itself, was sufficient consideration to bind the parties to the contract. *Id.* See also B-299255, Mar. 19, 2007 (guaranteed minimum of \$1,000 for multiple IDIQ contracts for health marketing training and consultation services was reasonable where the agency at the time of contract award could not determine how much work would go to any particular contractor).

Nothing in the FAR requires that a guaranteed minimum be a large amount. So, for example, under a solicitation for multiple IDIQ contracts for international ocean and intermodal transportation services, there was a minimum volume guarantee of one Forty-Foot Equivalent Unit (FEU) over the contract term because it was impossible for the agency, at contract award, to ascertain whether a contractor would carry more than that volume. B-278404.2, Feb. 9, 1998, at 8--9, 12. We concluded, therefore, that, while the quantity of one FEU is minimal, it was adequate consideration. *Id.* See also *Travel Centre v. Barram*, 236 F.3d 1316 (Fed. Cir. 2001) (\$100 guaranteed minimum for an IDIQ contract for travel management services was not nominal where it was not known how many agencies would choose to utilize the contract); B-291185, Nov. 8, 2002 (guaranteed minimum of only a few hundred dollars in an IDIQ contract for freight transportation services was sufficient where, after the minimum was satisfied, selection of contractors would be on a best-value basis).

In the information the Library has presented, the Library uses FEDLINK IDIQ contracts in those situations where there is some historical data, although the range of use varies depending on the particular contract. As mentioned above, the total

⁷ B-278404.2, Feb. 9, 1998; B-249307, Oct. 30, 1992. See also *Willard, Sutherland & Co. v. United States*, 262 U.S. 489, 493 (1923) (holding that a contract without a minimum quantity is unenforceable for "lack of consideration and mutuality").

amount purchased through each IDIQ contract ranges from \$1,000 to \$15.8 million. Some IDIQ contracts had no orders. In setting guaranteed minimums, the Library should evaluate the historical usage data for each category of items and services purchased, such as online databases or book repair services, and take into consideration any other factors for estimating the next year's use. We recognize that it is difficult for the Library to rely on historical data since it is serving the needs of other agencies. In the absence of reliable historical data, we have no basis to object to the use of \$500 as a guaranteed minimum amount.

Contracting Vehicles

We have long held that the contracting agency has the primary responsibility for determining its needs and the method of accommodating them, and that this principle applies to the contracting format used to purchase the items which the agency has determined are necessary. *See, e.g.*, B-295737, B-295737.2, Apr. 19, 2005; B-289378, Feb. 27, 2002; B-224004, B-224005, Dec. 18, 1986; B-220224, Dec. 17, 1985. Thus, the Library of Congress is in the best position to determine which contracting vehicle would suit any particular item or service that is part of the FEDLINK program. That being said, we offer the following information on the three types of contract vehicles raised in the request letter—basic ordering agreements, IDIQ contracts, and requirements contracts.

Basic ordering agreements (BOAs) are essentially open-ended agreements between a government agency and a contractor against which specific orders for specific items and services may be placed. FAR § 16.703. BOAs are often used when the specific items and quantities to be covered by a contract are not known at the time the agreement is executed. B-244633, Nov. 6, 1991, at 3 n.3. They are entered into for the mutual convenience of the government and the contractor, and contain "(1) terms and clauses applying to future contracts (orders) between the parties during its term, (2) a description, as specific as practicable, of supplies or services to be provided, and (3) methods for pricing, issuing, and delivering future orders under the basic ordering agreement." FAR § 16.703. BOAs are not contracts, and the government is not required to place any orders under these agreements. *Id.* Thus, placement of an order (and acceptance by the contractor), consistent with the FAR and the terms of the BOA, is the point at which there is a binding commitment which creates a legal liability of the government for the payment of appropriated funds for the goods or services ordered and the government incurs an obligation that must be recorded against the proper appropriation. 31 U.S.C. § 1501(a)(1). No obligation is incurred when the agency and contractor enter into a BOA.

The requirements of the IDIQ contract were explored in the previous section. Basically, the IDIQ contract requires the government to order only a stated minimum quantity of supplies or services. Purchase of that minimum quantity ends any governmental legal obligation under the contract and the government "is free to purchase additional supplies or services from any other source it chooses. An IDIQ contract does not provide any exclusivity to the contractor." *Travel Centre*, 236 F.3d at 1319. This contract vehicle generally provides the needed flexibility for

requirements that cannot be accurately anticipated. The concern identified by the Library is the difficulty of estimating an appropriate guaranteed minimum to be charged against the Library's reserve at the time the IDIQ contract is executed since the items and services are not for FEDLINK but for other agencies. This concern, addressed in the previous section, may be overcome by the recommended assessment of each category of goods and services to determine an amount that, based on historical usage, agencies are fairly certain to order through FEDLINK, and the use of \$500 as the guaranteed minimum in the absence of reliable historical data.

The Library also inquired into the use of a requirements contract, which differs from an IDIQ contract. A requirements contract provides for filling all purchase requirements of designated government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor. FAR § 16.503(a). The promise by the buyer to purchase the subject matter of the contract exclusively from the seller is an essential element of a requirements contract. A solicitation will not result in the award of an enforceable requirements contract where a solicitation provision disclaims the government's obligation to order its requirements from the contractor and therefore renders illusory the consideration necessary to enforce the contract. *See* B-280945 *et al.*, Dec. 4, 1998; B-266238, Feb. 8, 1996. The applicable regulation requires that the solicitation and resulting contract state the estimated total quantity of goods or services needed. FAR § 16.503(a)(1). We have held that requirements contracts are valid if the estimate of the probable amount of goods or services to be generated was determined in good faith and based on the best information available. 63 Comp. Gen. 117 (1983). In addition, if feasible, the contract must include "the maximum limit of the contractor's obligation to deliver and the Government's obligation to order." FAR § 16.503(a).

Unlike the IDIQ contract, no minimum guarantees are required for a requirements contract because the agreement to procure all of the agency's requirements constitutes adequate consideration for the contract. 50 Comp. Gen. 506, 508 (1971); B-213046, Dec. 27, 1983. Since there is no guaranteed minimum, the government does not incur an obligation until an order for goods or services is placed against the requirements contract. B-302358, Dec. 27, 2004; B-259274, May 22, 1996. If, in the exercise of good faith, the anticipated requirements simply do not materialize, the government is not obligated to purchase the stated estimate or to place any orders with the contractor. 47 Comp. Gen. 365, 370 (1968). The contractor assumes the risk that nonguaranteed requirements may fall short of expectations, and has no claim for a price adjustment if they do. *Medart, Inc. v. Austin*, 967 F.2d 579 (Fed. Cir. 1992); 37 Comp. Gen. 688 (1958). If, however, the government attempts to meet its requirements elsewhere, including the development of in-house capability, or if failure to place orders with the contractor for valid needs is otherwise found to

evidence lack of good faith, liability on the part of the government will result. *E.g.*, *Rumsfeld v. Applied Companies, Inc.*, 325 F.3d 1328, 1339 (Fed. Cir), *cert. denied*, 540 U.S. 981 (2003); *Torncello v. United States*, 681 F.2d 756, 768-69 (Ct. Cl. 1982).

A handwritten signature in black ink, appearing to be 'D. Gordon', with a long horizontal flourish extending to the right.

Daniel I. Gordon
Acting General Counsel