U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: ITility, LLC

File: B-419167

Date: December 23, 2020

Isaias Alba, IV, Esq., Jacqueline K. Unger, Esq., Christine C. Fries, Esq., and Jonathan I. Pomerance, Esq., Piliero Mazza PLLC, for the protester.
Alexander B. Ginsberg, Esq., Meghan D. Doherty, Esq., Robert Starling, Esq., and Kevin R. Massoudi, Esq., Pillsbury Winthrop Shaw Pittman LLP, for Enterprise Information Services, LLC, the intervenor.
Christine Fontenelle, Esq., and Pavan Mehrotra, Esq., Department of Homeland Security; John W. Klein, Esq., and Sam Q. Le, Esq., Small Business Administration, for the agencies.
Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that a procuring agency was required to set aside a procurement for small businesses, instead of issuing its requirements as a task order on an unrestricted basis under a multiple-award contract, is denied where the procuring agency used its discretion pursuant to Federal Acquisition Regulation sections 16.505 and 19.504, as well as 13 C.F.R. § 125.2(e)(6)(ii), not to set aside for small businesses a task order issued under a multiple-award contract.

DECISION

ITility, LLC, a small business of Chantilly, Virginia, protests the issuance of a task order to Enterprise Information Services, LLC (EIS), of Vienna, Virginia, under request for quotations (RFQ) No. 70RDAD20Q00000133, issued by the Department of Homeland Security (DHS), for program management and information technology support for the DHS Financial Systems Modernization (FSM) Joint Program Management Office (JPMO). ITility alleges that DHS conducted inadequate market research to determine whether the procurement should have been set aside for small business concerns, and otherwise failed to comply with other applicable acquisition planning requirements.

We deny the protest.

BACKGROUND

DHS was officially created in January 2003, merging 22 formerly independent agencies into one cabinet-level department. DHS currently includes 14 component operational and support organizations. When DHS was first established, there were 13 separate core financial systems across its components, operating under legacy policies and disparate business processes. In accordance with a September 2011 memorandum issued by the DHS Under Secretary for Management, DHS established the FSM Program to plan and execute key financial management requirements, minimize investment in duplicative systems, meet federal guidance, and deliver financial management information to leadership to support the DHS mission. The FSM Program is coordinated by the DHS Office of the Chief Financial Officer through the JPMO. Agency Report (AR), Tab 13, RFQ No. 70RDAD19Q00000101 at 1-2.[1] DHS intends to transition DHS headquarters and its components to standard financial, procurement, and asset management business processes using as few separate solutions as is practicable and in a cost-effective manner. AR, Tab 2, Contracting Officer's Statement (COS) at 2.

The JPMO is responsible for: (i) identifying, implementing, and overseeing modern and compliant financial management systems and business processes across DHS; (ii) providing standardized business processes to align with statutory mandates; (iii) providing change and program management services; (iv) leading and managing DHS business integration, financial management process standardization, functional requirements management, and the people side of change; (v) preparing cost estimates and budget requests; (vi) managing available funds, program schedule, risks, and personnel; (vii) managing the execution of contracts and agreements; and (viii) ensuring that project plans are implemented on schedule, within scope, and within budget. AR, Tab 9, Task Order No. 70RDAD18FR0000032, at 12.

On October 23, 2018, DHS awarded service-disabled veteran-owned small business (SDVOSB) set-aside task order No. 70RDAD18FR0000032 to ITility under the DHS Program Management, Administrative, Operations, and Technical Services II (PACTS) multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contract. Under the task order, ITility performs program and technical support services for the JPMO and DHS's travel management programs. The task order originally had a 10-month base period, and four 1-year option periods. *Id.* at 32. DHS, however, subsequently amended the base period of performance to 11 months. AR, Tab 9, Task Order No. 70RDAD18FR0000032, mod. No. 1, at 1. At the completion of the base period, DHS exercised the first option period, extending performance through September 22, 2020. COS at 2.

[1] References herein to page numbers for agency report exhibits are to the electronic page numbering of the exhibits as submitted by the agency.

At the time of ITility's task order award, PMO had four branches: (1) FSM Program Management; (2) Project and Financial Management; (3) Information Technology (IT) Management; and (4) Business Transformation. AR, Tab 9, Task Order No. 70RDAD18FR0000032 at 13. ITility's task order was structured to support these specific branches. *See*, *e.g.*, *id.* at 15-18 (delineating tasks in support of the Project and Financial Management Branch), 18-25 (same, with respect to the IT Management Branch). In June 2020, during the first option year, the JPMO was reorganized to include two additional branches.

As part of the reorganization, DHS decided that it was preferable to restructure the support services to align with the agency's functional needs, as opposed to the organizational branches as they were currently structured. In reaching this decision, DHS noted that while organizational structures change over time, core program management functions remain constant. As a result, DHS concluded that a functionally-based approach would provide the agency with the flexibility to effectively support functional requirements spanning across branches, or in the event of organizational change or realignment. *See, e.g.*, AR, Tab 6, Procurement Strategy Roadmap at 4; COS at 2.

Additionally, DHS decided that more IT-centric technical support services were needed due to evolving requirements. Specifically, the JPMO is currently supporting FSM implementation activities for the Countering of Weapons of Mass Destruction Office, the Transportation Security Administration, and the U.S. Coast Guard. Additionally, the JPMO is anticipated to support additional upcoming, concurrent FSM efforts, including for Immigration and Customs Enforcement and the Federal Emergency Management Agency. *See, e.g.*, AR, Tab 5, Market Research Rep., at 1; Tab 6, Procurement Strategy Roadmap at 4. Considering these and other impending requirements, the JPMO concluded that ITility's current task order did not provide sufficient levels of expertise and support capacity to adequately support JPMO's projected requirements.

Specifically, DHS reached the following conclusion:

> The FSM program is projected to continue to grow exponentially when the current Enterprise Financial System Integrator (EFSI) and Enterprise Financial Management Software (EFiMS) awards are made, requiring the JPMO to coordinate and manage several concurrent FSM implementations for DHS Headquarters and Components in Fiscal Year 2021 and 2022. The current and projected JPMO program management and Information Technology support requirements are beyond the capabilities of current JPMO contractor support, which has experienced challenges in adapting to the evolving mission needs of the JPMO FSM program. The new FSM program management team has determined a more technically oriented, IT centric contract mechanism with contractor support staff that possess skills and expertise in the areas of coordinating multiple concurrent financial, procurement and asset management system

> implementations is vital to the success of the FSM Program, and necessary to achieve JPMO mission needs.

AR, Tab 6, Procurement Strategy Roadmap at 5-6.

To meet the agency's anticipated IT support needs, DHS concluded that several additional labor categories that were not included on ITility's task order, will be needed, including: network and computer systems administrator; software quality assurance engineer and tester; information technology program manager; database architect; and computer systems engineer/architect.[2] COS at 8.

As a precursor to fulfilling its changed requirements, DHS undertook market research to inform its acquisition approach. DHS effectively limited its review to six multiple-award IDIQ contracts. *See* AR, Tab 5, Market Research at 4-5; Tab 6, Procurement Strategy Roadmap at 7-8. DHS believed that this approach was necessitated by DHS policy, which generally directs agency contracting officials to procure agency requirements using strategic sourcing contract vehicles. *See* AR, Tab 12, Development and Use of Strategic Sourcing Contract Vehicles, DHS Directive No. 060-01 (Aug. 24, 2012) at 4 (mandating the use of strategic sourcing contract vehicles absent an applicable exception). For each of the six multiple-award contracts, DHS considered the vendors holding the contracts, the periods of performance, the available labor categories, and the scope of available services. AR, Tab 6, Procurement Strategy Roadmap at 7.

First, DHS considered the General Services Administration's (GSA) One Acquisition Solution for Integrated Services contract. DHS found that the contract did not best suit its anticipated requirements because DHS did not believe the contract would provide sufficient competition. Specifically, DHS noted that five recent procurements for office of chief financial officer services resulted in one-bid responses. *Id.* at 7. Next, DHS considered the National Institute of Health's Chief Information Officer – Solutions and Partners 3 contract. DHS, however, rejected use of that contract because the contract's duration of services fell short of what was needed for the JPMO. *Id.* The third contract considered by DHS was DHS's Services for Enabling Agile Delivery contract. DHS concluded that the nine contract holders did not have experience with providing professional support services including technical and information technology expertise

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[2] We note that ITility initially argued that the scope of work of its PACTS II contract was essentially the same as the challenged RFQ's scope, other than containing "a better delineation of tasks and subtasks." Protest at 4. In its comments, ITility, while still maintaining that the scopes of work are functionally equivalent, now recognizes that DHS requires a higher level of expertise and more personnel than currently included under ITility's current task order. *See* ITility Comments at 12 (arguing that DHS could satisfy its changed needs by either modifying the existing task order or awarding another task order under the PACTS II contract vehicle). Thus, while the parties contest the extent and nature of the change in DHS's requirements, there is no dispute that in fact DHS's needs have changed.

with large financial, procurement, and asset management system implementation efforts. *Id.*

DHS also considered GSA's Veterans Technology Services 2 (VETS 2) contract. The VETS 2 contract is set aside for SDVOSBs and has a vendor pool of 69 firms. *See* "VETS 2 Industry Partners," https://www.gsa.gov/technology/technology-purchasing-programs/governmentwide-acquisition-contracts/vets-2-sdvosb/vets-2-industry-partners (last visited Dec. 23, 2020). While the contract's scope is IT centric--involving technical expertise in data management, information and communications technology, IT operations and maintenance, IT security, software development, and systems design--DHS concluded that it did not offer sufficient expertise in the required program management areas. AR, Tab 6, Procurement Strategy Roadmap at 8.

DHS additionally considered GSA's 8(a) STARS II contract. The 8(a) STARS II contract is set aside for small disadvantaged businesses and has more than 700 industry partners. *See* "8(a) STARS II Industry Partners," https://www.gsa.gov/technology/technology-purchasing-programs/governmentwide-acquisition-contracts/8a-stars-ii/8a-stars-ii-industry-partners (last visited Dec. 23, 2020). DHS found that the contract did not have a period of performance or functional area of expertise that would align with JPMO's requirements. In this regard, the contract's disciplines are primarily focused on custom computing programming services, computer systems design, computer facilities management services, and ancillary IT equipment and services related functions. DHS found that these disciplines were insufficient to support the JPMO requirements for expertise assisting in daily oversight, coordination, and management of multiple cross-functional teams engaged in the deployment and systems integration of financial, procurement, and asset management software platforms. AR, Tab 6, Procurement Strategy Roadmap at 8.

Lastly, DHS considered, and ultimately selected GSA's Alliant 2 contract. DHS selected the Alliant 2 contract because it believed the contract provided both the depth and breadth of program management and information technology services needed by JPMO, a suitable performance period, and a wide vendor pool with experience in large implementation efforts. *Id*. DHS also considered whether it could set aside the task order under the Alliant 2 contract, but found that it was not possible because the Alliant 2 small business contract awards had been vacated following a bid protest filed before the United States Court of Federal Claims, and the resulting corrective action was ongoing. *Id.* at 5-6.

On June 24, DHS released the RFQ only to Alliant 2 contract holders. *See* COS at 10. As a result, ITility, which does not hold an Alliant 2 contract, had no access to, or knowledge of, the RFQ. On September 11, DHS issued the task order to EIS; the total

anticipated contract value is $59,677,286. *See* Protest, exh. E, beta.SAM.gov Award Notice. On September 21, ITility filed this protest with our Office.[3]

DISCUSSION

ITility protests the issuance of the unrestricted task order to EIS, arguing that, pursuant to 15 U.S.C. § 644(a) and FAR 19.502-2, the agency was required to set aside the requirement for small business concerns. ITility argues that reasonable market research would have shown that numerous small business concerns, such as ITility, are capable of and interested in performing this requirement at reasonable prices. DHS answered that it conducted a reasonable analysis with respect to whether the procurement should be set aside for small business concerns, and complied with statutory and regulatory set-aside requirements. During the development of the protest, our Office requested that the parties address whether in fact DHS was required to conduct such a set-aside analysis prior to issuing the task order RFQ. Specifically, we asked the parties to address whether a set-aside analysis was mandatory or discretionary in light of the statutory provisions of 15 U.S.C. § 644(r), its implementing regulations, and our prior decisions interpreting those authorities.

In light of the issues presented, our Office also invited the Small Business Administration (SBA) to provide its views on these issues, pursuant to 4 C.F.R. § 21.3(j). ITility and SBA maintain that the small business set-aside requirements are mandatory and must be applied prior to placing the work under a multiple-award contract and proceeding with an unrestricted task order. In contrast, DHS argues that this analysis is discretionary under these circumstances. For the reasons that follow, we find that DHS has the discretion, as opposed to the obligation, to set aside the task order at issue. Therefore, we deny the protest.[4]

Timeliness

Before turning to the merits of the protest, we first address why we declined the agency's and intervenor's requests to dismiss this protest as untimely.[5] DHS and EIS

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[3] Based on the approximately $60M value of the task order, the protest falls within our statutory grant of jurisdiction to hear protests in connection with task and delivery orders valued in excess of $10 million issued under civilian agency multiple-award IDIQ contracts. 41 U.S.C. § 4106(f).

[4] ITility raises other collateral arguments. Although our decision does not specifically address every one of the protester's arguments, we have carefully reviewed them and find that none provides a basis on which to sustain the protest.

[5] EIS also argues that ITility is not an interested party because it did not sufficiently establish that it is capable of performing the current requirements. *See, e.g.*, Intervenor Comments & Req. for Dismissal; Intervenor Resp. to Supp. Briefing Req. The intervenor's arguments are without merit. Determining whether a party is interested

(continued...)

both argue that ITility's post-award protest of the agency's decision not to set aside this task order procurement for small businesses constitutes an untimely challenge to the terms of the RFQ. DHS and the intervenor argue that the protester should be charged as having constructive notice of DHS's decision to procure its new requirements on an unrestricted basis, based both on DHS's decision not to exercise the option on ITility's incumbent task order and on information posted to a DHS acquisition forecasting website. We disagree.

Generally, a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial quotations, including a challenge to an agency's decision not to set aside a procurement for small businesses, must be filed prior to the closing date for the receipt of quotations. 4 C.F.R. § 21.2(a)(1); *Candor Solutions, LLC*, B-418682.2, Sept. 15, 2020, 2020 CPD ¶ 297 at 6 n.3. When, however, an agency's actions preclude the possibility of filing a timely challenge to the terms of a solicitation, our Office has stated that the timeliness rule of 4 C.F.R. §21.2(a)(1) does not apply; instead, the 10-day rule of 4 C.F.R. § 21.2(a)(2) applies.[6] *Latvian*

(...continued)
involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. *Latvian Connection, LLC*, B-410947, Mar. 31, 2015, 2015 CPD ¶ 117 at 3. Here, we find that ITility has sufficiently established its status as an interested party.

For example, as addressed above, DHS considered using the VETS 2 contract, a SDVOSB set-aside IDIQ held by 70 vendors, including ITility. In its comments, ITility argues that the VETS 2 contract includes the same labor categories required by the current task order and as included on the Alliant 2 contract, and, therefore, DHS should have procured its requirement under the VETS 2 contract. *See* ITility Comments at 6-7; *see also id.* at 8 n.4 ("Critically, while the Agency asserts that ITility's *current task order* under PACTS II does not meet the Agency's changed needs, nothing in the record establishes that *ITility* itself is unable to meet the Agency's purportedly changed needs. . . . ITility would be able to provide the same labor categories sought under the RFQ through its VETS 2 contract, and it could also provide those same capable and qualified personnel through other contract vehicles or on the open market.") (emphasis in original). As this and other examples demonstrate, we find that ITility sufficiently demonstrated that it is an interested party that could compete for the requirements if we sustained its protest.

[6] In relevant part, 4 C.F.R. § 21.2(a)(2) provides that protests "other than those covered by [4 C.F.R. § 21.2(a)(1)] shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier)." Neither DHS nor EIS contest that ITility's protest was filed within 10 days of the public posting of the notice of award, the first time ITility reasonably knew or should have known of the agency's decision to acquire these requirements under the Alliant 2 contract.

Connection, LLC, B-411489, Aug. 11, 2015, 2015 CPD ¶ 251 at 5; *Morrison Knudsen Corp.*, B-247160, Jan. 7, 1992, 92-1 CPD ¶ 35 at 2.

Here, the record reflects that DHS issued the solicitation for its requirements solely to the holders of the Alliant 2 contract. Because ITility is not an Alliant 2 contract holder, it did not have access to the solicitation and thus did not know that DHS was procuring the FMS Program requirements under the Alliant 2 contract vehicle. Nonetheless, DHS and EIS argue that we should dismiss ITility's protest as untimely because the protester failed to undertake reasonable due diligence once DHS indicated that it was not exercising ITility's option on its incumbent order. Again, we disagree.

The record here reflects that ITility and DHS engaged in a long series of discussions and exchanges between February and June 2020 regarding the agency's changing requirements, and whether ITility could support the anticipated changes through a modification to its task order. Throughout the course of those discussions, and once they ended, ITility sought guidance from DHS with respect to its anticipated acquisition approach and needs. We have seen nothing in the record suggesting that DHS clearly articulated its decision to pursue its subsequent requirements on an unrestricted basis during those exchanges with ITility. Thus, far from being the result of a lack of reasonable due diligence, it is apparent that ITility's inability to ascertain the status of DHS's follow-on acquisition approach was the direct result of DHS's decisions to (1) decline to respond to the protester's inquiries, and (2) distribute the RFQ via a mechanism that precluded non-Alliant 2 contract holders from accessing the RFQ.

Next, DHS and EIS argue that ITility had constructive notice of the agency's intent not to set aside the JPMO procurement for small businesses because of DHS's posting of its forecasted procurement on the agency's Acquisition Planning Forecast System (APFS). This argument fails for at least two critical reasons. First, DHS's APFS is not the government-wide point of entry (GPE) designated for the publication of solicitations. Instead, https://beta.sam.gov has been designated as the GPE--that is, the single point where government business opportunities greater than $25,000 (such as the RFP here) are published, including synopses of proposed contract actions, solicitations, and associated information that can be accessed electronically by the public.[7] FAR 2.101, 5.101, 5.102, 5.201. While offerors are charged with constructive notice of procurement actions published on the GPE, ITility did not have constructive notice in this instance because the APFS is not the GPE. *Latvian Connections, LLC*, 2015 CPD ¶ 251, *supra*.

Second, the notice posted to DHS's APFS was a forecasted procurement action--not the issuance of an unrestricted solicitation. In this regard, the APFS system makes clear that the information posted to the site is tentative forecasting of the agency's

[7] We have recognized that the FAR designates www.fbo.gov as the GPE, but that the single, GPE has since migrated to https://beta.sam.gov. *See Virtual Medical Grp., LLC*, B-418386, Mar. 25, 2020, 2020 CPD ¶ 113 at 1 n.1; *MCI Diagnostic Center, LLC*, B-418330, Mar. 11, 2020, 2020 CPD ¶ 103 at 1 n.1.

procurement needs, and does not present a firm intent to commence a procurement action.[8] *See* "About This Website," https://apfs-cloud.dhs.gov/about/ (last visited Dec. 23, 2020) ("All projected procurements are subject to revision or cancellation. . . . The forecast data is for planning purposes, does not represent a pre-solicitation synopsis, does not constitute an invitation for bid or request for proposal, and is not a commitment by the Government to purchase the desired products and services."). We have repeatedly explained that a protest challenging an agency's mere stated intention not to set aside a procurement, without the issuance of an unrestricted solicitation, is premature.[9] *See, e.g.*, *Glen/Mar Constr., Inc.*, B-298355, Aug. 3, 2006, 2006 CPD ¶ 117 at 2-3; *Ystueta, Inc.*, B-296628.4, Feb. 27, 2006, 2006 CPD ¶ 46 at 2-3; *York Int'l Corp.*, B-244748, Sept. 30, 1991, 91-2 CPD ¶ 282 at 2.

Thus, we find no merit to the arguments of DHS and EIS that ITility could have known DHS's intention to move forward with an unrestricted procurement from the limited information available to the protester prior to DHS posting the notice of award to EIS on the GPE. The arguments reflect a fundamental misunderstanding of our protest timeliness rules, and effectively promote the filing of defensive protests based merely on inferences of the government's ultimate intent. Therefore, we find that the protest was timely filed within 10 days of when ITility knew or reasonably should have known of the agency's decision to procure its requirements under the Alliant 2 contract.[10]

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[8] We also note that the APFS notice does not provide meaningful information (*e.g.*, a draft performance work statement) regarding the forecasted procurement that ITility reasonably could have used to evaluate whether the scope of the proposed task order reasonably should have been set aside for small businesses. In this regard, the notice only provides a title ("Joint Program Management Office (JPMO)") and limited description of the intended scope of work ("The Contractor shall provide expert support services for information technology and program management support services."). *See* DHS Req. for Dismissal, exh. C, APFS JPMO PMO IT Services APFS Notice, at 1.

[9] This case is readily distinguishable from our decision in *Cygnus Corp.*, B-406350, B-406350.2, Apr. 11, 2012, 2012 CPD ¶ 152, on which the intervenor bases its arguments for dismissal. Here, unlike the facts in *Cygnus*, the agency did not publish a solicitation on the GPE.

[10] We also asked the parties to separately address whether the protest was effectively an untimely challenge to the terms of the Alliant 2 contract pursuant to our decision in *Datamaxx Group, Inc.*, B-400582, Dec. 18, 2008, 2008 WL 5397147. In *Datamaxx*, we dismissed as untimely a challenge by a small business contractor that failed to timely challenge the terms of a subsequently issued IDIQ contract that clearly included within its scope the protester's incumbent set-aside work. Here, however, ITility's set-aside incumbent task order was issued after the issuance of the Alliant 2 solicitation. Thus, it would not be reasonable to have expected ITility to challenge Alliant 2's apparent inclusion of set-aside requirements that post-dated Alliant 2's issuance. Therefore, we also decline to dismiss the protest on this basis.

Additional Background Regarding the "Rule of Two" and 15 U.S.C. § 644(r)

Having concluded that ITility is an interested part to maintain this protest, we find it necessary to set forth and review the procurement principles regarding the "Rule of Two"--the applicable legal framework governing small business set-aside requirements. The "Rule of Two" describes a long-standing regulatory policy intended to implement provisions in the Small Business Act, 15 U.S.C. § 644(a), requiring that small businesses receive a "fair proportion of the total purchases and contracts for property and services for the Government." 49 Fed. Reg. 40,135 (Oct. 3, 1984). Accordingly, the Rule of Two requires agencies to set aside certain procurements for small businesses. First, each acquisition with an anticipated dollar value above the micro-purchase threshold (currently $10,000), but not over the simplified acquisition threshold (currently $250,000), shall be set aside for small businesses unless the contracting officer determines that there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of fair market prices, quality, and delivery. 15 U.S.C. § 644(j); FAR 2.101; FAR 19.502-2(a). For acquisitions exceeding the simplified acquisition threshold, a contracting officer shall set aside the acquisition for small businesses if there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns, and (2) award will be made at fair market prices. FAR 19.502-2(b).

Prior to 2010, neither the Small Business Act nor its implementing regulations expressly addressed whether the issuance of task or delivery orders under multiple-award contracts were subject to, or otherwise exempt from, the mandatory set-aside requirements. In *Delex Systems, Inc.*, B-400403, Oct. 8, 2008, 2008 CPD ¶ 181, our Office concluded that the set-aside provisions of FAR 19.502-2(b) applied to competitions for task and delivery orders issued under multiple-award contracts. Specifically, we explained that the Rule of Two applied to "any acquisition," and we construed the term acquisition to encompass task and delivery orders. *Id*. at 8.

On September 27, 2010, Congress passed the Small Business Jobs Act, amending the Small Business Act to address the question of setting aside for small businesses task or delivery orders that are issued under multiple-award contracts. Small Business Jobs Act of 2010, Pub. L. No. 111-240, Sept. 27, 2010, 124 Stat 2504. The Jobs Act amended the Small Business Act in relevant part as follows:

> Section 15 of the Small Business Act (15 U.S.C. 644), as amended by this Act, is amended by adding at the end the following:
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> (r) MULTIPLE AWARD CONTRACTS.--Not later than 1 year after the date of enactment of this subsection, the Administrator for Federal Procurement Policy and the Administrator [of the SBA], in consultation with the Administrator of General Services, shall, by regulation, *establish guidance under which Federal agencies may, at their discretion--*
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> * * * *

> (2) notwithstanding the fair opportunity requirements under section 2304c(b) of title 10, United States Code, and section 303J(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. § [4106(c)])[11], set aside orders placed against multiple award contracts for small business concerns, including the subcategories of small business concerns identified in subsection (g)(2). . . ."

124 Stat. 2504, 2541 (emphasis added).

On November 2, 2011, an interim rule was published in the Federal Register allowing federal agencies to begin taking advantage of the authorities set forth in 15 U.S.C. § 644(r) while SBA developed its regulations. 76 Fed. Reg. 68032 (Nov. 2, 2011). Relevant here, the interim rule added a new provision at FAR 19.502-4, Multiple-award contracts and small business set-asides. *Id.* at 68035. The new provision provided that:

> In accordance with section 1331 of Public Law 111-240 (15 U.S.C. 644(r)) contracting officers *may, at their discretion*--
>
> (c) Set aside orders placed under multiple-award contracts for any of the small business concerns identified in 19.000(a)(3).

FAR 19.502-4(c) (emphasis added). Additionally, the interim rule similarly amended FAR subpart 16.5's ordering provisions to state that agencies "may, at their discretion," set aside orders for small business concerns.[12] FAR 16.505(b)(2)(i)(F).

On October 2, 2013, SBA promulgated its own regulations to implement 15 U.S.C. § 644(r). These regulations include two relevant provisions. First, SBA's regulations state that: "The contracting officer *in his or her discretion may . . . set aside, or preserve the right to set aside, orders against a Multiple Award Contract* that was not itself set

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[11] For task and delivery orders issued under civilian agency multiple-award IDIQ contracts, "all contractors awarded the contracts shall be provided a fair opportunity to be considered, pursuant to the procedures set forth in the contracts, for each task order in excess of the micro-purchase threshold," absent certain enumerated exceptions not relevant here. 41 US.C. § 4106(c). The companion provision located at 10 U.S.C. § 2304c(b) imposes the same fair opportunity requirements for multiple-award contracts issued by defense agencies and the National Aeronautics and Space Administration. *See also* FAR 16.505(b) (implementing the fair opportunity requirements).

[12] The relevant provision goes on to state that: "*When setting aside orders for small business concerns*, the specific small business program eligibility requirements identified in part 19 apply." FAR 16.505(b)(2)(i)(F) (emphasis added).

aside for small business. The ultimate decision of whether to use any of the above-mentioned tools in any given procurement *is a decision of the contracting agency.*" 13 C.F.R. § 125.2(e)(1)(ii) (emphasis added). Additionally, the regulations state: "Notwithstanding the fair opportunity requirements set forth in 10 U.S.C. 2304c and 41 U.S.C. 4106(c), a contracting officer *may* set aside orders for small businesses . . . against full and open Multiple Award Contracts." *Id.* at (e)(6)(i) (emphasis added).

Our Office was first confronted with interpreting the Jobs Act and the above-described regulatory implementation in *Edmond Scientific Co.*, B-410179, B-410179.2, Nov. 12, 2014, 2014 CPD ¶ 336. In that case, the Department of the Army issued a task order on an unrestricted basis under a multiple-award IDIQ contract that included both small and large business contract holders. The protester, a small business contract holder, filed a protest challenging the Army's decision not to set aside the task order for the small business contract holders. The protester, joined by SBA, argued that the Army was required to conduct a Rule of Two analysis prior to proceeding with an unrestricted task order.

After reviewing 15 U.S.C. § 644(r) and the above-described regulatory implementation, we denied the protest. Specifically, we explained that "these regulations, by their plain language, grant discretion to a contracting officer about whether to set aside for small business participation task orders placed under multiple-award contracts." *Edmond Scientific, supra* at 7. We further explained our position that our prior decision in *Delex* was superseded by the passage of the 15 U.S.C. § 644(r). *Id.* at 8 n.10. We specifically found that the statutory grant of discretion does not require application of the Rule of Two prior to issuing an order, unless the multiple-award contract or task order solicitation expressly anticipated the use of the Rule of Two. *Id.; see also Technica Corp.*, B-416542, B-416542.2, Oct. 5, 2018, 2018 CPD ¶ 348 at 10 ("As our Office has explained, [FAR 16.505(b)(2)(i)(F)], along with the relevant provision in 15 U.S.C. § 644(r), make clear that agencies are not required to set aside an order for small businesses, absent specific contractual language obligating the agency to do so.").

We further expounded on our statutory interpretation of Section 644(r) in *Aldevra*, B-411752, Oct. 16, 2015, 2015 CPD ¶ 339. In *Aldevra*, the protester, supported by the SBA, argued that because a proposed Federal Supply Schedule (FSS) order had an anticipated value between the micropurchase and simplified acquisition thresholds, the agency was required to comply with small business set-aside requirements.[13] We

[13] We acknowledge that *Aldevra* involved a protest allegation that the procuring agency was required to set aside a FSS order that was valued between the micropurchase and the simplified acquisition thresholds, while this protest involves an allegation that an agency should have set aside a task order valued in excess of the simplified acquisition threshold under a multiple-award IDIQ contract. Notwithstanding these different facts, our analysis in *Aldevra* interpreting whether the grant of discretion afforded by 15 U.S.C. § 644(r) is an exception to the Small Business Act's mandatory set-aside requirements is germane to our analysis here.

disagreed based on the discretionary language of 15 U.S.C. § 644(r). Specifically, we explained that:

> Given the language of the Jobs Act, as well as regulatory provisions implementing the Jobs Act, it is readily apparent that the general small business set-aside rule . . . implemented under FAR § 19.502-2, does not apply when placing orders under the FSS program. In this regard, the Jobs Act clearly provides for granting agency officials discretion in deciding whether to set aside orders under multiple-award contracts.

Aldevra, *supra* at 5-6.

In support of the protester's position, SBA additionally argued that our Office should interpret 15 U.S.C. § 644(r) as merely providing contracting agencies with the discretion to place set aside orders against unrestricted multiple-award contracts as an exception to the statutory fair opportunity requirements. In this regard, SBA argued that we should not interpret the statutory grant of discretion as alleviating contracting agencies from complying with the Small Business Act's mandatory set-aside requirements when issuing orders under a multiple-award contract. SBA also argued that a contrary interpretation would effectively repeal the Small Business Act's mandatory set-aside requirements by implication. We disagreed because we found that the amendment to the Small Business Act under 15 U.S.C. 644(r) established an express exception to the more general mandatory set-aside rules of 644(j) for orders placed against multiple-award contracts. We found that this exception is rooted in the discretion granted to contracting agencies under 644(r) to decide whether to set aside orders. Specifically, we explained that:

> First, SBA's repeal by implication argument is misplaced since the application of section 644(r), by its terms, and as implemented through the regulations noted above, is limited to multiple-award contracts and orders placed under such contracts. Thus, to the extent the set-aside requirement of section 644(j) is understood as not applying to orders under multiple-award contracts, section 644(j) would continue to have full application to all other types of contracts. Accordingly, just as the SBA would seek to harmonize the provisions at issue by interpreting section 644(j) as carving out an exception with respect to section 644(r), an equivalent harmony can be achieved by changing the direction of the exception; that is, by properly understanding section 644(r) as having carved out a limited exception with respect to section 644(j) for orders under multiple-award contracts.
>
> Our interpretation in this regard is further bolstered by the second problem with SBA's position. That is, SBA's reading of the two provisions is at odds with the regulatory framework adopted to implement section 644(r). As noted above, FAR § 19.502-2 expressly provides that the small business provisions of the FAR, to include the provision implementing

> section 644(j), are not mandatory. Accordingly, the regulations have essentially established section 644(r) as an exception to section 644(j) where orders under the FSS are concerned, thereby providing a harmonious application of the two sections. Third, we note that the interpretation set forth by SBA is at odds with its own regulations; specifically, 13 C.F.R. § 125.2(e) . . . which establishes, without identifying any exception, that it is within a contracting officer's discretion whether to set aside an order against a multiple-award contract that was not itself set aside for small businesses.

Id. at 6-7.

Thus, our decisions in *Edmond Scientific* and *Aldevra* comprehensively established our interpretation of the import of 15 U.S.C. § 644(r) and its implementing regulations, namely that set-aside determinations under multiple-award contracts are discretionary, not mandatory. Those decisions also addressed--and rejected--contrary interpretations that 15 U.S.C. § 644(r) only authorized contracting officers to issue set-asides under multiple-award contracts as an exception to applicable fair opportunity requirements. As addressed above, absent exceptions not applicable here, agencies are generally required to provide all holders of a multiple-award IDIQ contract an opportunity to compete for resulting task orders. 41 US.C. § 4106(c). SBA previously argued that the discretion provided by the Jobs Act should be interpreted as effectively providing another enumerated exception to the fair opportunity rules (*i.e.*, to allow contracting agencies to set-aside orders for small businesses without violating its obligation to provide all IDIQ contract holders an opportunity to compete for the order), but did not relieve agencies from mandatory set-aside requirements when considering the placement of an order under a multiple-award IDIQ contract.

Subsequent to our decisions in *Edmond Scientific* and *Aldevra*, a proposed and final rule in FAR part 19 was issued to implement 15 U.S.C. § 644(r) and the SBA's final regulations.[14] Relevant here, the FAR now provides that "[i]n accordance with section 1331 of the Small Business Jobs Act of 2010 (15 U.S.C. 644(r)(2)), contracting officers *may, at their discretion*, set aside orders placed under multiple-award contracts" for small business concerns. FAR 19.504(a) (emphasis added).

SBA's and ITility's Arguments that the Rule of Two Applies Here

As an initial matter, we note that SBA's and ITility's submissions reflect their respective disagreement with our prior interpretation of the import of the changes implemented by

[14] On December 6, 2016, the proposed rule implementing changes to the FAR based on SBA's issuance of its final rules was published in the Federal Register. 81 Fed. Reg. 88072 (Dec. 6, 2016). On February 27, 2020, the final rule implementing the December 2016 proposed rule was published in the Federal Register. 85 Fed. Reg. 11746 (Feb. 27, 2020).

15 U.S.C. § 644(r) and its implementing regulations. In this regard, both parties argue that the "discretion" afforded to agencies applied only to the fair opportunity requirements applicable to multiple-award contracts, and not the discretion to determine whether to set aside task or delivery orders if the requirements of the Rule of Two are met. *See, e.g.*, ITility Resp. to Supp. Briefing Req. at 13 ("GAO should interpret the Rule of Two, Section 644(r), and its implementing regulations in a way that gives meaning to all provisions, does not repeal the Rule of Two by implication, and creates an exception only to the fair opportunity requirement as expressly intended by the Jobs Act."); SBA Comments at 1 ("The 2010 legislation applies to a specific situation in which an agency is choosing between restricting an order competition to small business and instead using the FAR's "fair opportunity" process."). Thus, this case presents at least the third time we have been presented with SBA's contrary interpretation as to the meaning and import of section 644(r) with respect to the applicability of the set-aside requirements when an agency places an order under a multiple-award contract. As addressed above, neither SBA nor ITility point to any change in the law that would cause us to reject our prior analysis.

Indeed, subsequent amendments to the FAR further support our prior analysis. As addressed above, the FAR amendments to part 19 to implement the 2010 Small Business Jobs Act and the SBA's final regulations emphasize the discretion afforded to contracting officers with respect to whether to set aside task orders under IDIQ contracts. Further, recent clarification of the FAR's issuance of the final rules implementing 15 U.S.C. § 644(r) supports our interpretation of the discretion afforded to contracting officers with respect to whether to set aside task orders under multiple-award contracts.

Relevant here, the Federal Register notice implementing the final rules rejected public comments on the proposed rule suggesting that the set-aside requirements were mandatory when setting aside task or delivery orders under multiple-award IDIQ contracts. The notice emphasized that 15 U.S.C. § 644(r) makes set-aside decisions of task orders discretionary, not mandatory. Specifically, the Federal Register includes the following exchange:

> *Comment*: Several respondents stated that because the court in [*Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969 (2016)] held that a task order was a contract, "contract" as written in 15 U.S.C. 644(j) includes task orders issued from multiple-award contracts, making order set-asides on multiple-award contracts mandatory not discretionary when applying the "rule of two." . . .
>
> *Response*: The "rule of two" described in Kingdomware refers to the [Veterans Affairs (VA)] statute, 38 U.S.C. 8127, not a requirement in the Small Business Act. The Kingdomware decision is silent on the construction of the Small Business Act. The VA statute and the Small Business Act are written differently, with the former statute applying only to acquisitions of the [VA]. The VA statute only speaks to contracts and is

> silent on the handling of orders. Because of this silence, the Court concluded that the mandate applicable to contracts also applied to orders, since orders have the legal effect of contracts. *By contrast, the Small Business Act has separate and distinct provisions addressing contracts and orders and addresses each in a different manner*. Section 1331 of the Jobs Act (15 U.S.C. 644(r)) addresses order set-asides *and makes the application of the "rule of two" discretionary for orders placed under multiple-award contracts*. 15 U.S.C. 644(j) applies to contracts and mandates application of the "rule of two" for contracts valued at the simplified acquisition threshold or less.
>
> 15 U.S.C 644(r) is specific in that it only applies to multiple-award contracts. Legislative history demonstrates that prior to 15 U.S.C. 644(r), there was a mixed record of small business participation on multiple-award contracts. Congress was clear in section 1331 of the Jobs Act that under a multiple-award contract, *agencies may, at their discretion* . . . conduct a set-aside of orders under a multiple-award contract.

85 Fed. Reg. at 11746 (emphasis added).[15]

Thus, far from supporting the position espoused by SBA and ITility, new legal developments directly undercut their position. In this regard, we agree with the analysis in the Federal Register that Congress intended to clearly delineate a distinction between a procuring agency's mandatory set-aside obligations when establishing a contract, and an agency's discretion with respect to setting aside task or delivery orders under a multiple-award IDIQ contract. We also note that this dichotomy between the mandatory set-aside requirements at the contract level, and the discretion afforded to contracting officers at the task or delivery order level, appears to be facially consistent with the regime set forth in the SBA's own regulations.

Specifically, 13 C.F.R. § 125.2(e) itself highlights that the set-aside requirements are mandatory when establishing the multiple-award contract itself, but the regulation then shifts and uses discretionary language when discussing the placement of orders against a multiple-award contract that was not set aside for small businesses. In relevant part, the regulation states:

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[15] The December 6, 2016 Federal Register notice implementing the proposed rules similarly rejected an argument requiring automatic set-asides for orders between the micropurchase and simplified acquisition thresholds. Specifically, the response explained that: "The proposed FAR rule implements the regulatory changes provided in SBA's final rule, including clarification of the procedures for setting aside task and delivery orders under multiple-award contracts. *SBA's rule does not require orders to be set aside.*" 81 Fed. Reg. at 88073 (emphasis added).

(i) The contracting officer *must* set-aside a Multiple Award Contract if the requirements for a set-aside are met. . . .

(ii) The contracting officer *in his or her discretion may . . . set aside, or preserve the right to set aside, orders against a Multiple Award Contract* that was not itself set aside for small business. The ultimate decision of whether to use any of the above-mentioned tools in any given procurement *is a decision of the contracting agency.*

Id. at (e)(1) (emphasis added).

Therefore, we find no basis to depart from our Office's prior interpretation in *Edmond Scientific* that 15 US.C. § 644(r) creates an exception for orders placed under an IDIQ contract from mandatory small business set-aside requirements.

SBA and ITility also argue, however, that our foregoing interpretation of 15 U.S.C. § 644(r) and its implementing regulations is not controlling in this case. Specifically, SBA and ITility argue that *Edmond Scientific* only involved a discrete challenge whether to set aside an individual order under an IDIQ contract, while this protest challenges "whether the agency properly used a vehicle with no small business competition." SBA Comments at 10; *see also* ITility Resp. to Supp. Briefing Req. at 13 ("Critically, GAO was not presented with, and did not decide, the question of whether the agency was required to conduct a Rule of Two analysis prior to its decision to use the [specific IDIQ] contract, since the selection of that contract vehicle was not challenged.") (emphasis in original).

In support of its argument, the protester cites to a recent decision issued by the United States Court of Federal Claims (COFC), *The Tolliver Grp., Inc. v. United States*, __ Fed. Cl. __, Nos. 20-1108C, 20-1290C, 2020 WL 7022493 (Nov. 30, 2020), to argue that this case can be distinguished from our decision in *Edmond Scientific* and should have a different result. In *Tolliver*, the court decided that it had jurisdiction to hear--and ultimately sustained--a protest challenging a procuring agency's failure to apply the Rule of Two prior to issuing an unrestricted task order. The court in *Tolliver* distinguished *Edmond Scientific* by noting that unlike the protester in *Edmond Scientific*, which was a small business contractor under the relevant IDIQ contract, the protesters in *Tolliver* were challenging the agency's moving of work currently performed by small businesses "to a [multiple-award] IDIQ where the incumbents are ineligible to compete for an award." *Tolliver Grp.*, 2020 WL 7022493 at *36 n.63.

Similar to the court in *Tolliver*, ITility and SBA attempt to draw a distinction between protests challenging an agency's decision not to set aside an order when they are filed by an IDIQ contract holder (a contractor that is "inside" the IDIQ), as was the case in *Edmond Scientific,* and a protester that is not a holder of the underlying IDIQ contract (a contractor "outside" the IDIQ). As addressed above, ITility and SBA both argue that under the facts in this case, because ITility is "outside" the Alliant 2 contract, DHS had no discretion with respect to performing a Rule of Two analysis before issuing the order

under the Alliant 2 contract, and is required to set aside the acquisition because there are at least two small businesses outside Alliant 2 capable of doing the work at reasonable prices.[16]

We are not persuaded by ITility's and the SBA's efforts to distinguish our decision in *Edmond Scientific* on the basis that the case turned on the fact that the protester was "inside" as opposed to "outside" the IDIQ contract. First, this dichotomy has no basis in the Small Business Act or the FAR. In this regard, this argument would require us to evaluate an agency's acquisition planning without regard to whether the acquisition is in connection with the issuance or proposed issuance of a task order, but, rather, whether the agency's acquisition planning preceding its ultimate acquisition approach (*e.g.*, contract versus order) was reasonable. We do not, however, review inchoate acquisitions; rather, we only review specific procurement actions, such as the issuance of a solicitation or proposed award of a contract or order. 31 U.S.C. § 3551(1).

For example, as addressed above, we do not consider protests challenging an agency's stated intention to set aside a procurement prior to the issuance of an unrestricted solicitation. *See, e.g.*, *Glen/Mar Constr., Inc.*, *supra*; *Ystueta, Inc.*, *supra*; *York Int'l*

[16] The protester, SBA, and the court's decision in *Tolliver* support their position by relying on our decision in *LBM, Inc.,* B-290682, Sept. 18, 2002, 2002 CPD ¶ 157, *recon. denied, Dep't of the Army Req. for Modification. of Recommendation*, B-290682.2, Jan. 9, 2003, 2003 CPD ¶ 23. *See, e.g.*, *Tolliver Grp.*, 2020 WL 7022493 at *36 n.63 ("In short, none of those GAO cases, except *LBM*, addresses the precise issue of an agency moving work currently performed by a small business to a [multiple-award] IDIQ where the incumbents are ineligible to compete for an award."). Our decision in *LBM* can be distinguished from the case at hand in two important respects. In *LBM, Inc.*, the protester, a small business incumbent contractor, filed a protest challenging the agency's decision to acquire the identical follow-on requirements on an unrestricted basis under a request for task order proposal issued under an IDIQ contract that the protester did not hold. In *LBM*, we viewed the protest not as a challenge to the proposed task order, as is the case here, but, rather, as a challenge to the terms of the underlying IDIQ contract. *LBM, Inc.*, *supra* at 4.

Here, however, as addressed above, while ITility argues that the requirements covered by the challenged task order are functionally equivalent to its current work, it does not materially contest that DHS's current requirements are different from ITility's current task order because DHS requires additional, more senior IT-centric labor categories and expertise. More importantly, *LBM* was issued eight years prior to the passage of the 2010 Jobs Act, which amended the Small Business Act to include the provisions of 15 U.S.C. § 644(r) and the accompanying FAR provisions, all of which grant contracting agencies discretion when deciding whether to set aside orders under multiple-award contracts.

Corp., *supra*. We have further explained that an agency's acquisition planning, including compliance with moving work previously subject to small business set-aside restrictions to task orders not subject to those restrictions are necessarily made "in connection with" the proceeding task order procurements, and are not separate matters that we review "in a vacuum." *ServFed, Inc.*, B-417708, Sept. 18, 2019, 2019 CPD ¶ 326 at 4 (dismissing protest for lack of jurisdiction challenging procuring agency's decision to remove protester's incumbent requirements procured under the 8(a) program to an unrestricted task order with a value below the Federal Acquisition Streamlining Act's applicable jurisdictional threshold because where "the specific procurement involved in a protest is the issuance of a task order, and the requested remedy would involve termination of the task order, the protest is necessarily 'in connection with that task order.'") (citations omitted)); *see also Arch Sys., LLC*, B-417567, B-417567.2, July 2, 2019, 2019 CPD ¶ 227 (same, with respect to protest challenging the removal of the protester's Historically Underutilized Business Zone (HUBZone) incumbent work to a non-HUBZone task order). Thus, since the procurement action challenged here is the award of a task order, we find that the discretion afforded contracting officers when ordering under multiple-award IDIQ contracts applies here, regardless of the proposed "inside" versus "outside" distinction.

Second, the argument suggests that a small business without an IDIQ contract would have a greater ability to challenge an agency decision to set aside an order than would a contractor that holds the contract under which the order itself it issued. We see no basis for such disparate treatment. The "inside" versus "outside" dichotomy is entirely artificial because the small businesses that hold IDIQ contracts legally exist outside of the IDIQ contract as well.

In this regard, the protester in *Edmond Scientific*, like the protester in this case, could have just as easily argued that the order at issue should be set aside outside the IDIQ contract pursuant to the Rule of Two. We are not inclined to view the different result as being due to a pleading error by the protester in *Edmond Scientific*. In fact, in *Aldevra*, where we applied the same analysis as that in *Edmond Scientific*, the protester made the more general argument that the agency was required to set aside the procurement pursuant to the Rule of Two because there were multiple small business contractors that were not holders of multiple-award contracts. *See Aldevra, supra* at 2.

Finally, if we adopted ITility's and SBA's interpretation that a Rule of Two analysis is required before an agency selects the IDIQ contract vehicle, it is not apparent how an agency can ever get "inside" the IDIQ and exercise the discretion afforded by 15 U.S.C. § 644(r) in connection with the issuance of an order. To this point, if the Rule of Two is satisfied, a contracting officer would be required to set aside the contract for small businesses. Alternatively, if the Rule of Two is not satisfied, the contracting officer would not need the discretion established by § 644(r) and the FAR because there would not be two small businesses capable of performing the order. Thus, SBA's and ITility's arguments are not actually proposing a basis on which to distinguish *Edmond Scientific*, but, rather, would require us to overturn the decision and adopt the parties' position that the grant of discretion in the Jobs Act only provided an exception to the applicable fair

opportunity requirements (which we reject for the reasons set forth above). Therefore, for the reasons above, we reject SBA's and ITility's efforts to distinguish *Edmond Scientific.*

In sum, while we acknowledge SBA's important role in advocating and promoting the interests of small businesses in government contracting, and ITility's interest in competing for these specific DHS requirements under a set-aside procurement, our Office must recognize the broad grant of discretion afforded by Congress to agencies with respect to whether to set aside orders under multiple-award contracts. The arguments advanced by SBA and ITility, while pointing to the Small Business Act's general policy directing contracts to small businesses, do not reasonably account for Congress's subsequent clarification in the 2010 Jobs Act that the general policy was expressly made discretionary when ordering under a multiple award contract.

In this regard, the discretion afforded by the Jobs Act appears to be consistent with the broad discretion afforded to contracting officials when issuing orders against multiple-award IDIQ contracts. Specifically, with respect to ordering under multiple-award IDIQ contracts, the Federal Acquisition Streamlining Act's legislative history explained that "contracting officials will have wide latitude and will not be constrained by [the Competition In Contracting Act of 1984] requirements in defining the nature of the procedures that will be used in selecting the contractor to perform a particular task order," and "broad discretion as to the circumstances and ways for considering factors" for award. S. Rep. 103-258, 1994 U.S.C.C.A.N. 2561, 2576. Where Congress has enunciated a clear policy granting contracting officials discretion, and the Executive Branch's regulatory implementation similarly emphasizes the statutory grant of discretion, our Office cannot substitute the parties' or our own judgments on the matter.

Market Research

Next, ITility and SBA raise a number of challenges to DHS's market research, arguing that DHS failed to reasonably determine whether it was likely to receive quotations from two or more small businesses at fair market prices. However, as discussed above, agencies have the discretion to set aside task orders under a multiple-award IDIQ contract. *See* FAR 19.504(a); 13 C.F.R. § 125.2(e)(1)(ii). Thus, even if our Office were to agree with ITility and SBA that DHS's market research was not reasonable, there would be no basis for our Office to recommend any corrective action because the agency would not be required to set aside the procurement. *See American Relocation Connections, LLC*, B-416035, May 18, 2018, 2018 CPD ¶ 174 at 7 (agencies have the discretion to set aside procurements under the FSS, FAR 8.405-5(a)(2); based on this discretion, an agency's refusal to set aside an order under the FSS does not provide a basis to sustain a protest); *AeroSage, LLC*, B-414640, B-414640.3, July 27, 2017, 2017 CPD ¶ 233 at 5 (same, with respect to an agency's decision not to seek a waiver of the nonmanufacturer rule, FAR 19.102(f)(5)). We therefore find that ITility's argument

fails to state adequate legal grounds of protest, and therefore dismiss it on that basis.[17] *See* 4 C.F.R. § 21.5(f).

The protest is denied.

Thomas H. Armstrong
General Counsel

[17] For the same reason, we dismiss ITility's protest alleging that DHS violated the requirements of FAR 19.202-1(e)(1)(i). Under FAR 19.202-1(e)(1)(i), which implements the requirements of 13 C.F.R. § 125.2(c)(2)(iv), a contracting officer must coordinate with SBA if "[t]he proposed acquisition is for supplies or services currently being provided by a small business and the proposed acquisition is of a quantity or estimated dollar value, the magnitude of which makes it unlikely that small businesses can compete for the prime contract." Even assuming that this requirement would have applied here, a contention contested by DHS, we nevertheless can discern no competitive prejudice from DHS's failure to comply with the requirement here. Specifically, for the reasons set forth above, it was within DHS's discretion whether to set-aside the task order at issue. Thus, even if DHS should have conferred with SBA, there would be no basis for our Office to recommend any corrective action because the agency would not be required to set aside the procurement.