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FEATURE COMMENT: Keeping Your Options Open—Why Not To Worry About GAO’s *AllWorld* Decision On Task Order Options

For years, federal agencies have issued task and delivery orders, under Federal Supply Schedule and indefinite-delivery, indefinite-quantity contracts, that include many years of options that extend well beyond the underlying contracts’ ordering periods. And for years, agencies have exercised those options without regard to whether the time for placing new orders under the underlying contracts had expired.

Earlier this year, however, the Government Accountability Office threw sand in the gears of this long-established practice. In *AllWorld Language Consultants, Inc.*, Comp. Gen. Dec. B-411481.3, Jan. 6, 2016, 2016 CPD ¶ 12; 58 GC ¶ 65, GAO came to the surprising conclusion that an agency could not exercise options included in an FSS order after the underlying FSS contract’s ordering period had expired, even if the FSS order containing the option was issued during the FSS contract’s ordering period.

This unusual result has fostered concern among some agency officials about their ability to exercise FSS order options that the contracting parties necessarily assumed would be available when the agency awarded the order. Similarly, because of the logic of GAO’s decision, some contracting officials have become concerned that the exercise of task order options under IDIQ contracts is similarly foreclosed after the IDIQ contract’s ordering period ends, notwithstanding the timeliness of the task order itself.

But these concerns are misplaced. GAO’s decision relies on a misunderstanding of the terms of FSS (and IDIQ) contracts. When a competed FSS order or IDIQ

task order clearly provides for the exercise of options after the underlying contract’s ordering period has ended, and the FSS or IDIQ contract does not prohibit such actions, an agency may exercise the options in accordance with the order’s provisions. Those options are legally enforceable.

FSS and IDIQ Contracts Are “Valid” after Their Ordering Periods Expire—GAO’s decision in *AllWorld* involved a schedule order competition under a Federal Acquisition Regulation subpt. 8.4 General Services Administration FSS contract. After sustaining the protest on *other* grounds, GAO nonetheless went on to consider whether the awardee could perform all of the FSS order’s option periods, given that the ordering period of the awardee’s underlying FSS contract was set to expire shortly after order award and well before exercise of the first option period.

Although recognizing that the schedule order’s full base period could be performed despite expiration of the underlying FSS contract’s ordering period, and that inclusion of the options did not render the order award itself objectionable, GAO opined that “GSA cannot legally exercise the options included in the task order without a valid underlying FSS contract.” In support, GAO reasoned that “orders under FSS contracts are not themselves stand-alone contracts” because “the rights and liabilities of the parties under every FSS task order are governed by, and subject to, the terms and conditions of the underlying FSS contract.” In addition, according to GAO, the exercise of an option creates “new contractual responsibilities.” Thus, the creation of these “new contractual responsibilities” requires “a valid underlying FSS contract.”

FSS and IDIQ Contracts Have Distinct Ordering Periods and Order Performance Periods: GAO’s conclusion that an agency may not exercise options included in FSS orders if the ordering period of the underlying FSS contract has expired reflects confusion of the ordering period with the order *performance* period. As GSA pointed out, the FSS contract in question, like nearly all FSS contracts, contained FAR 52.216-22, which provides in pertinent part:

Any order issued during the effective period of this contract and not completed within that period shall be completed by the Contractor within the time specified in the order. The contract shall govern the Contractor's and Government's rights and obligations with respect to that order to the same extent as if the order were completed during the contract's effective period; provided, that the Contractor shall not be required to make any deliveries under this contract after ___ [insert date].

FAR 52.216-22(d).

FSS contracts also typically contain FAR 52.216-18(a), which states that supplies and services shall be ordered through the issuance of task or delivery orders, and "orders may be issued from _____ through _____ [insert dates]." Thus, FSS contracts have two important, but distinct, periods that govern orders. One, established by fill-in in FAR 52.216-18(a), is the period during which new orders may be placed, i.e., *the ordering period*. The other, established by fill-in in FAR 52.216-22(d), establishes the date after which the contractor is no longer obligated to perform, thus setting *the order performance period*.

GAO's decision ignores the difference between these two and thus treats an FSS contract as not "valid" once the ordering period expires. However, it is clear from their terms that FSS contracts are "valid" even after the ordering period established in FAR 52.216-18(a) expires. FAR 52.216-22 expressly provides that the terms and conditions of the underlying FSS contract continue to apply to any order issued within the ordering period.

Neither must the ordering period be in effect at the time of option exercise. FAR 52.216-18(a) applies only to the issuance of orders. It says nothing about the exercise of options. The *AllWorld* decision attempts to skirt this issue, along with the express permission of FAR 52.216-22 to continue order performance after expiration of the ordering period, by asserting that exercise of an option creates "new contractual responsibilities."

Presumably, the intended implication is that exercise of an option is the equivalent of issuing a new order, and thus must be done within the ordering period. But it is well established that option exercise does not create a new contract because "the parties' rights and obligations under the option clause are properly considered as part of the original contract." *Alliant Techsys., Inc. v. U.S.*, 178 F.3d 1260, 1276 (Fed. Cir. 1999); 41 GC ¶ 308. There is

simply no basis for the notion that exercise of an option for which an order expressly provides is the equivalent of issuing a new order.

Further reflecting this confusion between the ordering period and the performance period, the *AllWorld* decision cites language from the GSA FSS website stating that agencies may exercise options included in FSS orders only if the "options do not extend beyond the period of the Schedule contract, including option year periods." GAO interprets this statement to mean that the option must be exercised within the FSS contract's ordering period; however, that is not what the quoted language from the GSA website says. GSA's statement discusses an option's performance period, not the date of option exercise, and thus plainly refers to the order performance period established in FAR 52.216-22(d). GSA has since updated its website to make clear that agencies may exercise FSS order options after expiration of the ordering period, so long as the options' performance period does not extend the FSS order beyond the period established in FAR 52.216-22(d). See <http://www.gsa.gov/portal/content/200369>, last visited on July 1, 2016.

There Is No Viable Bid Protest of an Option Exercised after the Ordering Period Expires: Moreover, GAO's opinion that "GSA cannot legally exercise the options included in the task order without a valid underlying FSS contract" wanders far afield from the jurisdictional boundaries of bid protests. The sole basis of GAO's bid protest jurisdiction is the alleged violation of a procurement statute or regulation, 31 USCA § 3552, but the *AllWorld* decision does not draw any such link.

Under the Competition in Contracting Act, agencies must "obtain full and open competition through the use of competitive procedures in accordance with the requirements of this division and the Federal Acquisition Regulation." 10 USCA § 2304(a); 41 USCA § 3301(a). The FSS program is deemed to be a competitive procedure if ordering agencies adhere to "the procedures established by the Administrator of General Services for the multiple awards schedule program." 10 USCA § 2302(2)(C); see also FAR 6.102(d)(3).

Those procedures are set out at FAR subpt. 8.4, and nothing in that subpart restricts the inclusion or exercise of options in an FSS order. The exercise of options, for FSS orders as well as for other contracts, is governed by FAR subpt. 17.2, which states that the requirements of full and open competition are satisfied if an option was evaluated as part of the initial competition. FAR 17.207(f). Thus, exercise of an FSS order option after ex-

piration of the underlying FSS contract does not violate any procurement statute or regulation if the option was evaluated during the FSS order competition.

There is also little risk of a sustained protest of IDIQ task order options. The *AllWorld* protest arose in the context of a schedule order competition where the awardee's GSA FSS contract (but not the protester's) would expire before options could be exercised. The supposed impropriety with respect to options arose not in the solicitation itself, but in the peculiar conditions of the awardee, whose FSS contract would expire three days after the schedule order award. The protester filed a timely protest of the award, chiefly on grounds that had nothing to do with the options. Indeed, GAO's discussion of this issue expressly found that the inclusion of the options did not render the award improper, and it is unlikely that GAO would have sustained the protest on this ground.

Unlike in *AllWorld*, it is clear during an IDIQ task order competition whether the agency intends to have the right to exercise task order options even after the underlying IDIQ's ordering period ends. This is so because IDIQ task orders typically are competed among multiple-award IDIQ contract holders whose own contracts have similar ordering and performance periods. Thus, any interested party would be put on notice when an IDIQ task order solicitation is issued that the agency claims the contractual right under the task order to exercise options after the underlying IDIQ contract's ordering period ends.

To the extent this might be objectionable (and there is no reason to believe it would be), the issue would be required to be protested as a solicitation impropriety before submission of offers. See *Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308, 1315 (Fed. Cir. 2007); 49 GC ¶ 320; 4 CFR § 21.2(a)(1). To the extent non-contract holders also know or should know of the task orders' option provisions, they, too, would be time-barred from protesting at the time of IDIQ task order option exercise.

Task Order Options Exercised after the IDIQ Ordering Period Ends Are Enforceable: Nor do agencies face any risk regarding the enforceability of task order options exercised after a contract's ordering period expires. The *AllWorld* dicta on options are premised on GAO's finding that the awardee would not have "a valid underlying FSS contract" by the time the challenged order's first option period could be exercised. Regardless of GAO's observation about the "validity" or "expiration" of FSS contracts, the task order, including the option exercise, is binding on the contractor.

Even if an underlying contract expires, task orders issued under that contract remain enforceable contracts in their own right. As the U.S. Supreme Court recently observed, an FSS "order creates contractual obligations for each party and is a 'contract' within the ordinary meaning of that term" and "as defined by federal regulations." *Kingdomware Techs., Inc. v. U.S.*, 136 S.Ct. 1969, 1978 (2016); 58 GC ¶ 227. Moreover, many task orders expressly incorporate the terms of the underlying contract by reference, making the underlying contract's terms part of the task order's terms, independent of the status of the underlying contract. See *Public Warehousing Co., K.S.C.*, ASBCA 56116, 09-2 BCA ¶ 34,264 (noting that enforceable bridge contract incorporated the terms and conditions of contract that was about to expire).

Further, most contractors are happy to accept an option exercise. The contractor's unqualified agreement to the option exercise is a waiver of any imperfections that might otherwise render the option unenforceable. See, e.g., *Mabus v. Gen. Dynamics C4 Sys.*, 633 F.3d 1356 (Fed. Cir. 2011) (contractor bound to perform task orders issued by e-mail, even though contract required task orders to be issued by mail, because contractor had performed prior e-mailed task orders without objection); 53 GC ¶ 56; *USD Techs., Inc.*, ASBCA 31305, 87-2 BCA ¶ 19,680 (contractor bound to untimely exercised option where it signed bilateral modification agreeing to continue performance); *Burroughs Corp.*, DOTCAB No. 1327, 83-1 BCA ¶ 16,427 (contractor bound by untimely exercised option because it continued performance without raising objection).

Conclusion—GAO's *AllWorld* opinion should not cause agencies concern. The dicta in that decision rely on a misunderstanding of the terms of FSS contracts and a misinterpretation of GSA's policy. GSA has now clarified its position. More importantly, neither the decision nor any established legal principle could provide a viable ground of protest if an agency exercises an option on an FSS or IDIQ order after the underlying contract's ordering period expires. Finally, agencies and their contractors can rest assured that such options will be legally enforceable.



This FEATURE COMMENT was written for THE GOVERNMENT CONTRACTOR by W. Jay DeVecchio, Ethan E. Marsh, and James A. Tucker. Mr. DeVecchio is co-chair of Morrison & Foerster LLP's Government Contracts practice group, and Messrs. Marsh and Tucker are Government Contracts associates in the firm's Washington, DC, office.