

LEGAL ADVISOR



A PilieroMazza Update for Federal Contractors and Commercial Businesses

Current Trends in Federal Procurement

By Peter Ford and Michelle Litteken



For government contractors, staying ahead of the curve is critical for success. Knowing about a new law, policy, or program can provide you with a competitive

advantage. There are three current trends in federal procurement that are significantly affecting the means agencies use to purchase goods and services as well as the ways contractors compete for those opportunities: category management, the 809 Panel, and other transaction authority (“OTA”). Staying abreast of these trends and determining how you can effectively maneuver in the new marketplace should be a priority for all contractors.

Category Management

Category management has three primary goals: increasing savings, reducing the number of new contracts, and increasing the amount of spending that is subject to government-wide management. Category management applies to the types of goods and services that are common across federal agencies, referred to as “common goods and services.” In FY 2017, these common goods and services constituted \$303 billion in federal spending.

Category management was included as one of the goals in the President’s Management Agenda, which was released in March 2018. The President’s Management Agenda set a goal of achieving \$18 billion in savings by the end of 2020 by applying category management principals. To achieve this goal, the government will increase the number of common goods and services bought through best-in-class contract (“BIC”) solutions and reduce the number of duplicative contracts by

50,000. BICs are contracts designated by the Office of Management and Budget as meeting various criteria. There are currently approximately 30 BICs, including Alliant, OASIS, and VETS 2.

While the goals of category management are laudable, there are serious concerns about adverse impacts on small businesses. BICs are a pillar of category management, and using BICs restricts competition and reduces the number of opportunities for small businesses. The procurements for BICs are incredibly competitive, and the outcomes are significant. Winning a BIC can make a company, while losing such a valuable opportunity can adversely impact a contractor’s ability to get new work. Importantly, although the Government has exceeded its goal for BIC spending to small businesses, the data show that the majority of purchases went to the largest small businesses. And, in 2017, 80% of BIC spending was concentrated among the largest 138 BIC vendors (out of 3,257). This data indicates a real concern about the impact of category management on the industrial base, given that the increasing use of BICs is creating a wide disparity between the “haves” and the “have nots.”

There is no question that category management is reshaping the way agencies purchase goods and services. And, with bipartisan support, there is reason to believe that it will continue. Given the number of procurements and the proportion of federal spending affected, this is an issue to which contractors should be attuned.

809 Panel

The 809 Panel, which was created by Congress to develop recommendations to streamline and improve the defense acquisition process, also has the potential

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to materially affect government procurement. Indeed, the impact will likely be seen beyond the Department of Defense (“DOD”), as civilian agencies often adopt regulations and policies similar to those of the DOD.

The Panel issued its first report in January, which largely centered around the idea of adopting a new acquisition model focused on using streamlined procedures. Two aspects of this new model are particularly noteworthy.

The first proposal concerns changes to small business contracting. In this area, the Panel recommended that instead of focusing on meeting socioeconomic goals and primarily acquiring basic services and commodities, the DOD should focus on purchasing innovative goods and services from small businesses. The second notable aspect of the report pertains to bid protests. The Panel initially recommended creating a DOD-specific forum for protests, limiting the potential protest grounds a disappointed offeror could raise, shortening the time to resolve a protest, and limiting the relief available to a protester. These measures are aimed at reducing the number of protests.

After the Panel’s report was issued, the Panel received strong feedback from industry and other stakeholders. Some observers believed that it intended to eliminate the socioeconomic goals entirely and offered fierce opposition. Others objected to the proposed changes to the bid protest system as anticompetitive and unnecessary. Recent statements from the Panel indicate that it is reconsidering its approach to these two important issues.

Because the Panel’s final report is not expected until later this year, contractors have the opportunity to continue to give feedback and try to shape the Panel’s recommendations. This is significant, as the recommendations in the final report will likely impact multiple aspects of the procurement system.

OTA

OTA is a non-traditional acquisition method designed to give authorized agencies maximum flexibility in obtaining innovation without the red tape of traditional procurements. Eleven federal agencies are authorized to use OTA for different purposes. For example, DOD may use OTA for “prototype projects” that are directly relevant to enhancing the mission of military personnel.

This statutory authority is intentionally broad and reflects an expansion from the original purpose of developing weapons and weapons systems. Although OTA has been around for decades, Congress recently made the DOD’s authority permanent and doubled the dollar thresholds for required approvals of OTA. A contracting office may approve the use of OTA for up to \$100 million, and additional approval is needed to use OTA for projects between \$100 million and \$500 million and for projects in excess of \$500 million. These changes have increased the significance of DOD OTA.

Using OTA, authorized agencies can issue what are called “other transaction agreements,” or “OTAs.” Importantly, OTAs are not contracts, grants, or cooperative agreements, and they are not subject to the FAR or DFARS. They also are not subject to procurement statutes like the Competition in Contracting Act and the Procurement Integrity Act. Nevertheless, these transactions are not entirely immune from protest at the Government Accountability Office (“GAO”). Although GAO will not review an agency’s award decision once it properly elects to utilize an OTA, GAO will examine the transaction to assess whether the agency properly chose to use the OTA instead of a procurement contract.

While there are a variety of entity types that can enter into OTAs, forming or joining a consortium appears to be the common approach. Consortia are formed by contractors, non-traditional contractors, and academia based on industry/specialty. Commercial entities and academic institutions may apply to join a consortium as a member. These applications are relatively simple and widely available online. Thus, small businesses interested in pursuing an OTA should consider researching existing consortia and identifying one with a mission that overlaps with their services or products.

On September 12, 2018, PilieroMazza PLLC and NCMA’s Denver Chapter will be co-hosting a full-day workshop, “Staying Relevant in a Changing Federal Marketplace,” in Denver, Colorado, where we will be talking about these and other current trends affecting government contractors.

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