

Hope for Offerors Who Win Multiple-Award IDIQ Contract and Want to Protest Improper Award to Competitor

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You just learned your company is one of several winners of a multiple-award IDIQ contract. You also learned one of your competitors, which should have been ineligible, is also an awardee. So, as things stand, you'll have to split the contract — and compete for orders — with that competitor. Can you file a protest challenging the improper award to your competitor? Until last week, the answer was “no.” Now the answer is “maybe” — but only if you go to the Court of Federal Claims (“COFC”).

To pursue a protest, the protester must establish that it is an interested party, by showing that (1) it is an actual or prospective offeror; and (2) its direct economic interest would be affected by the award of, or failure to award, the contract in question. 31 U.S.C. § 3551(2)(A); 4 C.F.R. § 21.0(a)(1). Since its decision in *Recon Optical, Inc.*, et al., B-272239, July 17, 1996, 96-2 CPD ¶ 21, GAO has consistently held that winners of multiple-award IDIQ contracts are not interested parties for purposes of a protest, but it has typically done so while implying that, in rare circumstances, an awardee might be able to show it has an economic interest sufficient to make it an interested party.

GAO's most recent decision, however, articulated what appears to be a categorical prohibition on awardee protests. It opined that an IDIQ awardee cannot meet either prong of the interested party test: (1) GAO ruled that “an awardee, by definition, is not an actual or prospective offeror,” and thus “a protester's status as an awardee precludes its interested party status irrespective of any alleged economic interest.” *Aegis Defense Servs.*, B-412755, Mar. 25, 2016, 2016 CPD ¶ 98 at 3. (2) GAO also ruled that being forced to compete for future task orders against a company that should not have received an IDIQ award does not constitute a direct economic interest. *Id.* at 5. GAO reasoned that an IDIQ awardee has no legally cognizable expectation of receiving future task orders, making any economic interest speculative.

Several decisions by COFC have reached a similar conclusion, ruling that an IDIQ awardee cannot be an interested party because it is not a “disappointed bidder” (a phrase the Federal Circuit has used to define the Court's protest jurisdiction). See, e.g., *Automation Techs., Inc. v. United States*; 73 Fed. Cl. 617 (2006); *ABF Freight Sys., Inc. v. United States*, 55 Fed. Cl. 392 (2003); see also *Am. Fed'n of Gov't Employees, AFL-CIO v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (concluding that “Congress intended standing [for protests] to be limited to disappointed bidders.”). Some of COFC's decisions have also addressed the question of “economic interest,” and concluded that a multiple-award IDIQ contract awardee has no direct economic interest in an agency's award of

a contract to another company because, regardless of that award, it still will receive its required minimum order, and has an open-ended opportunity to win future orders under the contract.

It's not clear, however, that categorically denying an IDIQ awardee interested party status is the right result. An awardee is an "actual offeror" just like a disappointed bidder, which arguably satisfies the plain language of the statute. 31 U.S.C. § 3551(2)(A). And the "economic interest" analysis doesn't seem to account for the practical reality that an additional award means more competition for orders — and more parties to divide the spoils. It's a near-certainty that an improper IDIQ award to one company will reduce the work that the other awardees will receive under the contract. That would seem to give an IDIQ awardee a "direct economic interest . . . affected by the award" of a contract to an offeror that should have been rejected. 31 U.S.C. § 3551(2)(A).

While the door appears firmly closed at GAO, last week there was a breakthrough at COFC, where Judge Lettow found an IDIQ awardee did have standing to challenge the award to a competitor. [*National Air Cargo Group, Inc. v. United States*](#), 2016 WL 1719258 (Apr. 28, 2016). GAO had previously [dismissed the very same protest](#) for lack of interested party status — but the Court reached the opposition conclusion. It rejected the view that "a multiple-award IDIQ contract holder has no interest in the size of the IDIQ task order pool because that holder has only a right to some nominal minimum amount . . . of task orders." It described that view as "not realistic," explaining that while IDIQ contracts may guarantee each offeror only a nominal amount (e.g., \$2,500), those same contracts can result in the award of tens of billions of dollars. *Id.* at *12.

A decision by one COFC judge is not binding on others, so it's not clear if other judges will follow this approach. Some have previously issued opinions denying an awardee's interested party status. See, e.g., *Trailboss Enters., Inc.*, 111 Fed. Cl. 338 (2013); *Automation Techs.* 73 Fed. Cl. 617; *ABF Freight*, 55 Fed. Cl. 392. Whether an awardee can pursue a protest may therefore depend on which judge is assigned. But the takeaway from *National Air Cargo* is that, at least at the Court, there is now some hope for a multiple-award IDIQ contract winner that wants to protest an agency's improper award to a competitor.

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