

CLIENT ALERT

Technical Direction Letters Can Constitute Protestable Out-of Scope Modifications

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Competition is a foundational pillar of the federal government's procurement system. Having contractors compete to fulfill the government's requirements enables agencies — and by extension the taxpayer — to receive better prices for goods and services. Agencies, however, do not always adhere to the rules promoting competition. And given the complexity of federal procurement, agencies can adopt opaque practices that intentionally or inadvertently hinder effective competition. In this alert, we discuss one such practice: the issuance of out-of-scope Technical Direction Letters.

The Technical Direction Letter (TDL)

A TDL (also sometimes called "Technical Instructions") provides agency guidance to a contractor after award about a task in a contract's performance work statement. For example, a TDL can specify an exact time or place for the contractor to perform a task or identify the sequence of tasking. While a TDL provides further detail to the contractor for performing a task, it cannot conflict with the terms of the contract or task order under which it was issued.

TDLs are generally considered to be a tool of contract administration. As such, TDLs are not posted publicly but are typically transmitted from the agency through the contracting officer to the contractor. Generally, only the contracting parties know of the TDL. Given the non-public nature of TDLs, third parties in most instances do not receive notice of agency direction to a contractor. The non-public aspect of TDLs may be why there are hardly any bid protest decisions discussing them from the U.S. Court of Federal Claims or the Government Accountability Office (GAO).

Furthermore, a contractor asserting an inevitable out-of-scope contract modification during a regular post-award protest — essentially arguing that the agency will need to expand the scope beyond what was completed — will typically be met with dismissal by GAO, for GAO considers such arguments unripe and matters of contract administration. 4 C.F.R. § 21.5(a); *DOR Biodef., Inc.; Emergent BioSols.*, B-296358.3, B-296358.4, January 31, 2006.

Alliant Solutions, LLC, B-415994, May 14, 2018

Recently, however, GAO sustained a protest upon concluding that a TDL directed a contractor to perform work that was out of scope from the underlying task order. In *Alliant Solutions, LLC*, the General Services Administration (GSA), on behalf of the Navy, issued a TDL to Smartronix, Inc. under a contract titled the Rapid Response Technical Services (RRTS) task order.¹ The RRTS task order supported Intelligence, Surveillance, and Reconnaissance (ISR) information technology and irregular warfare. Further, the task order included work for the development of prototypes, processes and procedures, and future ISR system technologies. The RRTS task order defined a TDL as a way for the agency to communicate with the contractor “to answer technical questions, provide technical clarification, and give technical direction regarding the content of the Statement of Work.” The task order stated that TDLs shall not be used to assign new work, direct a change to the quality or quantity of supplies or services delivered, or change any other conditions of the task order.

Despite this limiting language of the RRTS task order, the TDL issued by GSA directed Smartronix to assist the Navy in establishing a commercial cloud computing facility. The project would transition tasks performed under a different contract in support of a conventional Navy datacenter to Smartronix to be performed in the cloud. Thereafter, Smartronix contacted Sabre Systems, Inc., about working on the TDL as a subcontractor and provided it a statement of work.

Sabre apparently shared the subcontract statement of work with Alliant Solutions, LLC (Alliant), a joint venture in which it participated. Alliant protested that the TDL was out of scope under the RRTS task order. Alliant argued that the RRTS task order had been originally competed for ISR and irregular warfare. Instead of issuing the TDL, Alliant contended that GSA should have competed the cloud computing work to holders of a GSA information technology Governmentwide Acquisition Contract (GWAC).

GAO agreed with Alliant and sustained the protest. In apparently a case of first impression, GAO determined that the TDL amounted to an out-of-scope contract modification. GAO found that the RRTS barely referenced cloud computing and focused on classified systems. In contrast, the TDL focused on enterprise-wide migration to cloud computing and did not mention classified systems. GAO concluded that work related to establishing an unclassified cloud environment under the TDL was substantively different from tasks supporting classified environments under the RRTS task order.

¹ As reflected in the public GAO decision, Andrew Victor was part of the bid protest team that represented the protester.

TDLs Can Be Construed As Out-of-Scope Contract Modifications

GAO's conclusion teaches contractors that, in certain circumstances, TDLs can be protested as out-of-scope contract modifications. Depending on the facts, GAO will cast aside labels, and scrutinize the substance of underlying contract and the work called for under the TDL. Another lesson to be learned is identifying the TDL in the first instance. Here, it appears that a joint venture member reported a questionable agency practice to its joint venture, which could protest by being an Alliant GWAC holder. Given the non-public nature of TDLs, future cases will most likely involve similar sharing of information between entities as they learn of shifting agency requirements.

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