

THE NEW TRANSPORTATION SECURITY ADMINISTRATION: ISSUES, CHALLENGES, OPPORTUNITIES



Single Source Contracting Opportunities

Ronald S. Perlman, Esq.
Partner, Zuckert Scoutt & Rasenberger, LLP

1) Context – Executive Agency NON-FAR based procurement -- to be like FAA’s AMS (“AMS+”)

FAA AMS § 3.1.1. Introduction: The goal of the Federal Aviation Administration (FAA) procurement system is to obtain high quality products, services, and real property in a timely, cost-effective manner, at prices that are fair and reasonable. The procurement system enables the FAA to be *innovative and creative* so that the right vendor is selected to implement a solution. The FAA procurement system is an integrated part of the acquisition process. The FAA procurement system focuses primarily on identifying sources, awarding, and administering contracts. The **FAA procurement system emphasizes competition**, selects the vendor with the best value and provides a protest forum through the FAA’s Dispute Resolution system.

3.1.3. Fundamental Principles: The FAA procurement system will:

- enable the selection of the contractor with the best value to satisfy the FAA’s mission;
- focus on key discriminators between vendors and their products or services to ensure timely, cost efficient, and quality contract performance;
- promote discretion, sound business judgment, and flexibility at the lowest levels while maintaining fairness and integrity;
- encourage the procurement of commercial and nondevelopmental items;
- provide streamlined methods and initiate innovative processes to conduct timely and cost-effective procurements;
- promote **open communication and access to information throughout the procurement process** and encourage use of electronic methods for information exchange;
- **encourage competition** as the **preferred method** of contracting;
- permit **single source contracting when necessary** to fulfill the FAA’s mission;

2) Statutory Authority

Compare Competition in Contracting Act (codified at 10 USC §2304 and 41 USC §253) with Aviation and Transportation Security Act (codified at 49 U.S.C. § 114(o)):

ACQUISITION MANAGEMENT SYSTEM - The **acquisition management system** established by the Administrator of the **Federal Aviation Administration** under section 40110 shall apply to acquisitions of **equipment, supplies, and materials** by the Transportation Security Administration, or, subject to the requirements of such section, the **Under Secretary may make such modifications to the acquisition management system with respect to such acquisitions of equipment, supplies, and materials as the Under Secretary considers appropriate, such as adopting aspects of other acquisition management systems of the Department of Transportation.**





3) Single source authority under FAA’s AMS (<http://fast.faa.gov/ams/docs/ams012002.doc>)

Section 3.2.2.4 Single Source Selection

The FAA may contract with a single source **when it is determined to be in the best interest of the FAA and the rational basis is documented**. This rational basis may be based on actions such as emergencies, standardization, and only source available to satisfy the requirement within the time required, which are necessary and important to support the FAA’s mission. For the procurements under \$10,000, there is no requirement for competition or single source justification, and requirements should not be split to meet this exception.

The decision to contract with a single source may be made as part of the overall program planning. The rational basis must either be documented and approved as a part of the **Acquisition Strategy Paper**, a Procurement Plan, or as a separate document. If an ASP is not required, *and the IPT determines that a Procurement Plan is unnecessary*, **an independent single source justification should be documented and endorsed by the IPT and approved by the contracting officer**.

Market analysis should be conducted to support each single source decision, except for **emergencies**. The method and extent of the analysis will be dependent on the requirement.

The contracting officer shall document the **objective criteria supporting the rational basis** for the decision in writing. Examples of the type of information that might be included are the results of market analysis, cost/price data, unique qualifications/performance capability, and past performance. **Mere conclusions without adequate objective supporting data** is insufficient.

After the decision to contract with a single source has been approved, a **public announcement** will be made for any action over \$100,000, except in emergencies. The purpose of the announcement is to inform industry of the basis of the decision to contract with the selected source.

A basic contract may be **modified**: to exercise an option, or to satisfy a follow-on procurement for more of the **same products/services** without seeking additional competition where based on market analysis, there is a rational basis not to compete the requirement and the rational basis is documented and approved as discussed in this subsection.

3.2.2.4.1 Single Source Procurement Process

The single source procurement process includes planning, communications, award, and lessons learned. ...

3.2.2.4.1.1 Emergencies

An emergency situation including but not limited to a threat to loss of life/property, national security, or restoration of an Air Traffic Control facility may require immediate contracting with a single source. In these instances, once the funds are committed the CO may give a contractor **verbal authorization** to proceed and the process phases may be consolidated or completed after the fact. As a minimum the CO should, as soon as practical:

- obtain funding certification;
- document the single source decision; and
- confirm with written notification.

3.2.2.4.1.2 Nonemergencies

For single source nonemergency procurements, planning may include:

- analyzing the market to determine potential sources;
- developing an independent FAA cost estimate;
- obtaining funding certification;
- obtaining approval of rationale for single source, except for follow-on or exercise of options; and
- issuing public announcement, if in excess of \$100,000.



In emergency situations, the CO may give a contractor verbal authorization to proceed and the process may be completed after the fact



3.2.2.4.1.3 Lessons Learned

Communicating lessons learned is encouraged.

4) Documentation

FAA AMS § 3.2.1.3.8: Single-Source Approval: The IPT determines whether the procurement should be conducted on a competitive or single source basis. The **rationale for the single source procurement should be included in the Acquisition Strategy Paper** or the procurement plan. If an ASP is not required, and the IPT determines that based on the complexity of the procurement a procurement plan will be established, the procurement plan should include the justification for the single source decision. **Approval of the ASP or the procurement plan constitutes approval of a single source procurement; no further approval or documentation is necessary.**

See also DOT Electronic Acquisition Research Library Sole Source Justification form, attached.

5) FAA statistics

- a) Competitive (54% (?))
- b) Noncompetitive (46% (?))

6) ODRA Cases statistics

- a) Filed since 1996 148 protests
 - i) Settled/withdrawn/resolved 86 (58%)
 - ii) Final decision 62 cases (42%)
 - (1) Dismissed 18
 - (2) Granted 16
 - (3) Denied 28
 - iii) Timeframe
 - (1) Settled/withdrawn/resolved: average 25 days (Range 1-134 days)
 - (2) Decision cases 61 days (Range 13 –118 days)

7) FAA ODRA Single Source cases (from <http://www.faa.gov/agc/odra/case.htm>)

- a) Bundling justified by need for integration of components (00-159)
- b) Rational basis for bundling (97-15; 00-159)
- c) Announcement of sole source award; purpose (96-8; 01-188)
- d) Considerations for sole source (96-8; 97-14)
- e) Failure to prove de facto sole source (00-159)
- f) No minimum communication required regarding sole source (96-8)
- g) Option not exercised, market survey (96-4)
- h) Rational basis for sole source (96-8; 99-117)
- i) Relation of sole source to preference for competitive procurement (96-8; 99-138)
- j) Preference for competition (98-79; 99-138; 01-177)
- k) Stay of award; need for compelling reason (99-139)





- 8) Conclusions regarding sole source situations at TSA
 - a) Time considerations
 - b) Technical considerations
 - c) Cost considerations
 - d) Staffing effects
 - e) Legal issues

