

## What Good Is Your BPA?

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A recent Federal Circuit decision confirms what most sophisticated contractors already know. While blanket purchase agreements (BPAs) may be useful to have for purposes of marketing and selling to the Government, they (as opposed to the task or delivery orders issued under BPAs) generally are not enforceable contracts. If a BPA does not obligate the Government to buy a dime's worth of service from you, and does not obligate you to provide a dime's worth of service to the Government, it may be a useful tool for agreeing to terms with an agency, but it is not itself a binding agreement.

Crewzers Fire Crew Transport, Inc., learned this lesson the hard way. In 2011, it became one of several awardees under Forest Service BPAs for heavy duty vehicles used to transport fire crews to wildfires and other disaster areas and for flame retardant tents. Because of the sporadic and unpredictable nature of wildfires, the Forest Service did not make any guarantee that it would actually place orders under the BPAs. Likewise, the BPAs called for Crewzers to accept orders only to the extent it was "willing and able." Later in the same year, the Forest Service terminated Crewzers' BPAs for certain alleged failures to meet requirements with respect to several orders under the BPAs. Crewzers challenged those terminations, alleging primarily breach of contract claims.

The problem is that to be valid and enforceable, a contract must have mutual "consideration"—both sides must have agreed to some obligation. It does not have to be much, but both sides must be on the hook for something. That basic principle is why all indefinite delivery indefinite quantity (IDIQ) contracts the Government enters into should include a minimum purchase amount and some obligation of the contractor to fulfill orders. By contrast, the Federal Circuit held in Crewzers' case:

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These BPAs reflect illusory promises that do not impose obligations on either party. The Forest Service is not required under the terms of the BPAs to place any orders with Crewzers. Likewise, Crewzers promised only to accept orders to the extent it is “willing and able,” and is thus perfectly free not to accept any orders at all.

The Court concluded that because the BPAs were not enforceable contracts, Crewzers' case was properly dismissed.

This decision does not mean that contractors should steer clear of BPAs. The Government regularly buys substantial quantities of products and services by awarding BPAs and issuing purchase orders under those BPAs. The terms of the BPAs are then incorporated into the orders, which are enforceable. But unless your BPA includes some minimal government requirement to purchase and imposes some requirements on you, it is merely a mechanism to assist you in entering into legally binding task and delivery orders.