

Government Contracts Advisory

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Task and Delivery Orders: New Protest Rights Effective May 27, 2008

The new right to protest the award of high dollar value orders issued under task and delivery order contracts becomes effective on May 27, 2008, for all orders issued on or after that date. Contractors performing multiple-award task and delivery order contracts — indefinite quantity contracts, other than GSA schedule contracts, that provide for the issuance of orders during the contract period — need to pay close attention to the rules associated with the new protest rights. Enhanced “fair opportunity” competition requirements for high dollar value orders also go into effect on May 27.

The new protest rights and competition requirements were enacted in Section 843 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181. The statute authorizes protests of any order “valued in excess of \$10,000,000.” (Previously, protests of orders under task and delivery order contracts were authorized only on the ground that the order increased the scope, period, or maximum value of the underlying contract.) The expanded protest rights apply to orders “awarded on or after” May 27 (i.e., 120 days after enactment of the statute), even if the underlying contract was awarded previously. Importantly, the statute authorizes protests under the \$10,000,000 exception only to GAO and not to the Court of Federal Claims or an agency.

The enhanced competition requirements, which apply to all orders in excess of \$5,000,000, include the right to a post-award debriefing “consistent with” the provisions of existing law that provide a right to a debriefing for contracts awarded on the basis of competitive proposals, but only if the debriefing is timely requested. This means that contractors must submit a written request for a debriefing on a task or delivery order award within three days of notice of the award in order to preserve their new debriefing rights.

Due to an ambiguity in how the debriefing provision in the statute will interact with GAO timeliness rules, contractors should not assume that the GAO rule providing a “safe harbor” for protests filed within ten calendar days of a requested and required debriefing in a procurement based on competitive proposals applies to protests of task or delivery orders. Until GAO clarifies that issue, protesters should assume that task and delivery order protests must be filed within ten days of the date on which the basis for protest is known or should have been known.

There is a strong argument that the statutory stay of contract performance applies to the protest of a task or delivery order (just as the statutory stay is generally viewed as applying to protests of orders issued under schedule contracts). This is on the theory that the award of a task or delivery order is the award of a “contract” as that term is defined in the FAR. Agencies may take a different position.

Another issue is whether contractors may file agency-level protests of the award of task or delivery orders over \$10,000,000. Section 843 gives GAO “exclusive jurisdiction” over protests filed under the high dollar value exception, stating that this grant of jurisdiction is made “notwithstanding” a provision of GAO’s statute that ordinarily makes GAO’s jurisdiction non-exclusive of both court and agency protests. That strongly suggests that agency protests are not authorized. While agencies presumably have

CONTACTS

If you would like more information, please contact any of the McKenna Long & Aldridge attorneys or public policy advisors with whom you regularly work. You may also contact:

Thomas C. Papson
202.496.7639

Richard B. Oliver
213.243.6169

Alison L. Doyle
202.496.7604

inherent authority to address potential procurement errors administratively in response to a request for corrective action (whether to a contracting officer or competition ombudsman), it is not clear whether GAO would recognize such a request as an agency “protest” for purposes of finding a subsequent GAO protest timely.

Other important competition requirements that will take effect on May 27 (for orders over \$5,000,000), include the requirement that all contract holders be provided with notice of a proposed order and that the notice include: a clear statement of agency requirements, a reasonable time to prepare a proposal, disclosure of significant evaluation factors and subfactors and their relative importance, and a statement of the best value basis for award.

Section 843 also prohibits agencies from awarding task or delivery order contracts estimated to exceed \$100,000,000 on a single source basis (as opposed to a multiple award basis), unless the head of the agency makes one of several findings provided in the statute. That provision also takes effect on May 27 for all contracts awarded on or after that date.

All of the provisions of Section 843 apply only to “task order contracts” and “delivery order contracts” as defined in and authorized by the Federal Acquisition Streamlining Act (FASA). As GAO and the Court of Federal Claims have both held, GSA schedule contracts are authorized by other statutes and are not subject to the task and delivery order contract provisions of FASA. We therefore do not anticipate any changes to the protest process for orders under schedule contracts.

The Defense Acquisition Regulatory Council has opened a FAR Case (2008-006) to address Section 843’s enhanced competition requirements and is developing an interim FAR rule. Nothing has yet been published, however.

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