

Government Contractor Client Alert September, 2008

GOVERNMENT ENACTS RULES DESIGNED TO EXPAND OPPORTUNITIES TO PROTEST THE AWARD OF TASK ORDERS AND ENHANCE COMPETITION

Effective September 17, 2008, the government enacted an interim rule which amends FAR 16.503, 16.504, and 16.505, the provisions in the acquisition regulations that deal with indefinite quantity contracts. These amendments are designed to implement the Fiscal Year 2008 National Defense Authorization Act, Section 843 "Enhanced Competition for Task and Delivery Order Contracts". The amendments implement certain statutory changes which are designed to enhance competition for task and delivery orders under IDIQ contracts and improve the fairness of the award process through "fair opportunity, transparency and accountability in contracting". These new interim rules apply to both civilian and military agencies. They are subject to comments and possible further revision. The following is a summary of the impact of the new changes:

1. GAO Protest Jurisdiction Expanded For IDIQ Orders Exceeding 10 Million Dollars.

This new rule establishes a broad right to protest the award of an order valued in excess of 10 million dollars before the Government Accountability Office (GAO). Prior to the enactment of this rule, disappointed offerors could only protest the award of orders issued in the narrow situation where the order increases the "scope, period, or maximum value" of the contract under which the order is issued. This limited protest right will still exist for orders below 10 million dollars. What this change means is that the procurement practices of an agency will be potentially subject to significantly more scrutiny under the GAO protest process when the agency uses IDIQ ordering procedures. Prior to the enactment of this rule, ordinary attempts to challenge the award of a task order required filing a complaint with the agency "ombudsmen", a process that has been criticized as an ineffective tool for promoting competition and providing meaningful oversight of the procurement process. This new rule applies to orders on existing contracts as well as orders on new contracts, and is subject to a sunset provision in three years.

2. Enhanced Competition Requirements For IDIQ Orders Exceeding 5 Million Dollars.

The new enhanced competition requirements for orders, on existing or new contracts, in excess of 5 million dollars call for the following:

- (A) A notice of the task or delivery order that includes a clear statement of the agency's requirements;
- (B) A reasonable response period;
- (C) Disclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating proposals, and their relative importance;
- (D) Where award is made on a best value basis, a written statement documenting the basis for award and the relative importance of quality and price or cost factors; and
- (E) An opportunity for a postaward debriefing in accordance with FAR 15.506, the standard debriefing provision which is ordinarily applicable to procurements under FAR Part 15.

3. Task Orders Under the GSA Federal Supply Schedules (FSS)

The foregoing new rules should be compared with the existing rules under FAR Part 8 governing orders under the GSA's FSS program. The protest limitations that have previously applied to IDIQ task orders do not apply to task and delivery order protests under the FSS program. Generally the GAO has been reviewing orders awarded under the FSS Program to make sure that they are fair and reasonable and will generally apply principles set forth in FAR Part 15 to the procurement of orders under the FSS schedule in evaluating the FSS procurement process. In other words, in contrast to previous orders under IDIQ contracts, orders under the FSS program have been subject to far more thorough scrutiny under the protest process.

Summary

These new requirements will hopefully result in improved opportunities for small and large businesses by promoting fairness and accountability in the contracting process for large orders under IDIQ contracts.

If you need any additional information concerning these new requirements, or other issues relating to government contracting, you can contact **Ken Brody of David, Brody & Dondershine, LLP at 703-264-2220 or KBrody@dbd-law.com.**

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