



CIVILIAN AGENCY ACQUISITION COUNCIL LETTER 2008-01

MAY 23 2008

MEMORANDUM FOR CIVILIAN AGENCIES OTHER THAN NASA

FROM:


AL MATERA
CHAIRMAN
CIVILIAN AGENCY ACQUISITION COUNCIL

SUBJECT:

Enhanced Competition for Task and Delivery Order Contracts

The Fiscal Year 2008 National Defense Authorization Act (Public Law 110-181), Section 843 "Enhanced Competition Requirements for Task and Delivery Order Contracts" includes several requirements regarding enhancing competition within the federal contracting framework. The provisions of Section 843 include a limitation on single award task and delivery order contracts greater than \$100 million; and two changes for task and delivery order multiple-award contracts: Enhanced competition for orders in excess of \$5 million; and GAO protests on orders valued in excess of \$10 million. The provisions of Section 843 do not apply to Federal Supply Schedule (FSS) contracts or orders placed under FSS contracts.

Section 843(b)(1) states that no task or delivery order contract in an amount estimated to exceed \$100 million (including all options) may be awarded to a single source unless the head of the agency determines in writing that; (a) the task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work; (b) the contract provides only for firm-fixed price task orders or delivery orders for (i) products for which unit prices are established in the contract, or (ii) services for which prices are established in the contract for the specific tasks to be performed; (c) only one source is qualified and capable of performing the work at a reasonable price to the Government; or (d) it is necessary in the public interest to award the contract to a single source due to exceptional circumstances. The agency head must also notify Congress within 30 days after making a determination in the public interest. These provisions are applicable to single award task or delivery order contracts awarded on or after May 27, 2008.

Section 843(b)(2) requires that for task or delivery orders in excess of \$5 million placed against multiple award task and delivery order contracts: all awardees shall be provided a notice of the order with a clear statement of requirements, a reasonable response period, disclosure of the significant evaluation factors and subfactors (and relative importance), and where award is made on a best value basis, a statement documenting the basis for award and the relative importance of quality and price or cost factors. Section 843 also provides an opportunity for a vendor to request a debriefing on orders valued over \$5 million. These provisions are applicable to orders awarded on or after May 27, 2008, on existing contracts as well as new contracts.

Section 843(b)(2) provides a mechanism to protest task or delivery orders valued in excess of \$10 million under multiple award contracts and states that the Comptroller General shall have exclusive jurisdiction over such protests. This is in addition to the existing law that protests are authorized on the grounds that the order increases the scope, period, or maximum value of the contract. The protest authority applies to orders on existing contracts, as well as on new contracts. The existing task and delivery order ombudsman jurisdiction to hear complaints still exists. Agency protests are not authorized.

A change to the Federal Acquisition Regulation (FAR) is in process (FAR Case 2008-006) to implement the Section 843 provisions. However, civilian agencies must plan to implement the changes on May 27, 2008, whether the FAR rule is issued by then or not.

If an agency believes that a FAR class deviation is necessary to implement this statute in the agency, this CAAC Letter serves as evidence of consultation with the CAAC Chair as required by FAR 1.404 for a class deviation.

My staff point of contact for this subject is Mr. William Clark at (202) 219-1813 or william.clark@gsa.gov.

Attachment

SEC. 843. ENHANCED COMPETITION REQUIREMENTS FOR TASK AND DELIVERY ORDER CONTRACTS.

(b) Civilian Agency Contracts.--

(1) Limitation on single award contracts.--Section 303H(d) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253h(d)) is amended--

(A) by redesignating paragraph (3) as paragraph (4); and

(B) by inserting after paragraph (2) the following new paragraph (3):

“(3) (A) No task or delivery order contract in an amount estimated to exceed \$100,000,000 (including all options) may be awarded to a single source unless the head of the executive agency determines in writing that--

“(i) the task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;

“(ii) the contract provides only for firm, fixed price task orders or delivery orders for--

“(I) products for which unit prices are established in the contract; or

“(II) services for which prices are established in the contract for the specific tasks to be performed;

“(iii) only one source is qualified and capable of performing the work at a reasonable price to the government; or

“(iv) because of exceptional circumstances, it is necessary in the public interest to award the contract to a single source.

“(B) The head of the executive agency shall notify Congress within 30 days after any determination under subparagraph (A) (iv).”.

(2) Enhanced competition for orders in excess of \$5,000,000.--Section 303J of such Act (41 U.S.C. 253j) is amended--

(A) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively;

(B) by inserting after subsection (c) the following new subsection (d):

“(d) Enhanced Competition for Orders in Excess of \$5,000,000.--In the case of a task or delivery order in excess of \$5,000,000, the requirement to provide all contractors a fair opportunity to be considered under subsection (b) is not met unless all such contractors are provided, at a minimum--

“(1) a notice of the task or delivery order that includes a clear statement of the executive agency's requirements;

“(2) a reasonable period of time to provide a proposal in response to the notice;

“(3) disclosure of the significant factors and subfactors, including cost or price, that the executive agency expects to consider in evaluating such proposals, and their relative importance;

“(4) in the case of an award that is to be made on a best value basis, a written statement documenting the basis for the award and the relative importance of quality and price or cost factors; and

``(5) an opportunity for a post-award debriefing consistent with the requirements of section 303B(e).''; and

(C) by striking subsection (e), as redesignated by paragraph (1), and inserting the following new subsection (e):

``(e) Protests.--(1) A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for--

``(A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or

``(B) a protest of an order valued in excess of \$10,000,000.

``(2) Notwithstanding section 3556 of title 31, United States Code, the Comptroller General of the United States shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).

``(3) This subsection shall be in effect for three years, beginning on the date that is 120 days after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2008.''.

(3) Effective dates.--

(A) Single award contracts.--The amendments made by paragraph (1) shall take effect on the date that is 120 days after the date of the enactment of this Act, and shall apply with respect to any contract awarded on or after such date.

(B) Orders in excess of \$5,000,000.--The amendments made by paragraph (2) shall take effect on the date that is 120 days after the date of the enactment of this Act, and shall apply with respect to any task or delivery order awarded on or after such date.