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ACQUISITION
TECHNOLOGY
AND LOGISTICS

MAY 23 2008

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (POLICY AND PROCUREMENT), ASA (ALT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & LOGISTICS MANAGEMENT), ASN (RDA)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DOD FIELD ACTIVITIES

SUBJECT: Enhanced Competition for Task and Delivery Order Contracts

Section 843 of the National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, "Enhanced Competition Requirements for Task and Delivery Order Contracts" is effective May 27, 2008 (attached). It includes several requirements enhancing competition. Section 843 specifies procedures for the placement of orders in excess of $5 million under a multiple award task or delivery order contract and provides for post-award debriefings with respect to such orders. Orders in excess of $10 million issued under a multiple award task or delivery order contract may be protested to the Government Accountability Office exclusively. These provisions apply to orders issued on or after May 27, 2008 under existing contracts as well as under new contracts.

Section 843 also stipulates 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 –

(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 or delivery orders for products for which unit prices are established in the contract or 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.

When a determination is based on public interest, the Head of the Agency must notify Congress within 30 days after making the determination.

The law pertaining to any single award task or delivery order contract is effective for contracts awarded on or after May 27, 2008. A change to the Federal Acquisition Regulation (FAR) is in process (FAR Case 2008-006). However, DoD Components must implement this change on May 27, 2008 regardless of whether the FAR rule has been issued. The Head of the Agency may delegate the authority to make the required determinations. However, the authority to make the determination authorized in (iv) above may be delegated no lower than to the Senior Procurement Executive (as defined in Part 202 of the Defense FAR Supplement). The Defense FAR Supplement will be changed to incorporate this limitation on delegation of authority.

My staff point of contact for this subject is Ms. Teresa Brooks at (703) 697-6710 or teresa.brooks@osd.mil.

for Shay D. Assad
Director, Defense Procurement,
Acquisition Policy, and
Strategic Sourcing

Attachment
As stated

Pub. L. 110-181 (NDAA-08)

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

(a) **Defense Contracts-**

(1) LIMITATION ON SINGLE AWARD CONTRACTS- Section 2304a(d) of title 10, United States Code, 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 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 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 2304c of such title 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 agency's requirements;

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

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`(3) disclosure of the significant factors and subfactors, including cost or price, that the 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 2305(b)(5) of this title.'; 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, 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.

(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.

Conf. Rpt. 110-477

Enhanced competition requirements for task and delivery order contracts (sec. 843)

The House bill contained a provision (sec. 821) that would address the issue of competition in contracting on a government-wide basis.

The Senate amendment contained a provision (sec. 821) that would encourage the use of multiple-award task and delivery order contracts in lieu of single-award contracts, enhance requirements for the competition of task orders and delivery orders under multiple-award contracts, and authorize bid protests for task or delivery orders in excess of $5.0 million under such contracts.

The House bill contained no similar provision.

The House recedes with an amendment that would address the competition issues in the Senate provision on a government-wide basis. The provision would raise the threshold for bid protests to $10.0 million and sunset the authorization for bid protests after 3 years. The conferees expect that the sunset date will provide Congress with an opportunity to review the implementation of the provision and make any necessary adjustments.