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GAO'S NEW BID PROTEST JURISDICTION MAY AIM TO FOSTER COMPETITION BUT LEAVES MANY QUESTIONS UNANSWERED

When President Bush signed the 2008 Defense Authorization Act on January 28, 2008, Section 843 – Enhanced Competition Requirements for Task and Delivery Order Contracts – authorized exclusive bid protest jurisdiction at the Government Accountability Office (“GAO”) in connection with a task or delivery order in excess of \$10 million.¹ Section 843 took effect on May 23, 2008, 120 days following the President’s signature.

Additional Provisions of Section 843: In addition to the bid protest jurisdiction granted to GAO, Section 843 includes several other provisions aimed at enhancing competition for task and delivery order contracts. For instance, government contracting agencies issuing a task or delivery order in excess of \$5 million must:

1. Provide notice of the order, including a clear statement of its requirements;
2. Give contractors a reasonable period of time to respond;
3. Disclose the significant factors and sub-factors, and the relative importance, that the agency will consider when evaluating a proposal;
4. When the award will be made on a best-value basis, provide a written statement substantiating the award and the relative importance of the various factors considered; and
5. An opportunity for a post-award debriefing.

Section 843 also establishes new rules for agencies awarding a task or delivery order contract in excess of \$100 million to a single awardee. To do so, under Section 843, the head of the agency must make a written determination that:

1. All task orders under the contract are so integrally related that only a single contractor can reasonably perform the work;
2. The contract provides only for firm, fixed-price task or delivery orders at specified unit prices;
3. Only one source is qualified and capable of performing the

¹ Please note that Section 843 does not alter GAO’s ability to hear protests of task or delivery orders issued under GSA Federal Supply Schedule (“FSS”) contracts. GAO has routinely treated protests of FSS orders as different from a task or delivery order protest.

- work at a reasonable price; or
4. It is necessary in the public interest to award the contract to a single source.

Furthermore, the contracting agency must also notify Congress within 30 days of the determination to award this type of contract to a single source.

Of these numerous changes, however, the authorization of bid protest jurisdiction to GAO to hear protests “in connection with the issuance or proposed issuance of a task or delivery order” is both the most noteworthy and the least defined provision in Section 843.

Background of Task and Delivery Order Protests: Section 843 actually restores the GAO’s previous jurisdiction to hear protests of task and delivery order contracts, which had been barred by enactment of the Federal Acquisition Streamlining Act of 1994. Originally, GAO was stripped of this jurisdiction to “streamline” the procurement process by shielding task and delivery orders issued against large indefinite delivery, indefinite quality (“IDIQ”) contracts from bid protests. However, in recent years, task and delivery order contracts under large IDIQ contracts have become increasingly more common and Congress has become concerned with their frequent use and lack of meaningful competition.

The GAO’s Renewed Protest Jurisdiction: Section 843 allows GAO to review task or delivery order awards over \$10 million, however, the legislation has several noteworthy aspects and is silent with regard to a few important issues:

- GAO’s task order jurisdiction may be short lived, as it contains a “sunset” provision that expires three years after its effective date.
- Section 843 gives GAO *exclusive* jurisdiction to review task and delivery order protests. This raises questions as to whether an agency-level protest is allowed and possibly whether the Court of Federal Claims has jurisdiction to address any issues relating to a task or delivery order protest.
- Section 843 is silent in regard to important procedural matters, such as whether an automatic stay of performance will apply to a timely protested order, whether the new debriefing is “required” for the purposes of GAO’s timeliness rules, and how the \$10 million threshold will be determined (*i.e.*, the government estimate, the awardee’s proposed price, or the protester’s proposed price, etc.).

Practitioner Tips:

- Government contractors competing for task or delivery orders should be mindful of their new rights, as well as approaches to effectively defend a task order award.

As guidance answering many of the questions noted above may only be determined through case law, government contractors should seek the assistance of experienced counsel before engaging in a protest of a task or delivery order.

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