VENABLE LLP

government contracts update
A PUBLICATION OF VENABLE'S GOVERNMENT CONTRACTS GROUP

AUTHORS

Thomas J. Madden
Washington, DC
tmadden@Venable.com
202.344.4803

James Y. Boland
Washington, DC
jyboland@Venable.com
202.344.8273

DoD Issues Interim Rule Authorizing Limited Competition for Products and Services from Iraq or Afghanistan

The Department of Defense (DoD) recently issued an interim rule under DFARS Case 2008-D002, authorizing a DoD preference for products and services (including construction) from sources in Iraq or Afghanistan and limiting the full and open competition requirement for such acquisitions under certain conditions. See 73 FR 53171. The interim rule was effective as of September 15, 2008, the date it was published. The interim rule exempts the acquisition of small arms from these new procedures. In publishing the interim rule, the Secretary of Defense found that urgent and compelling reasons justified publishing the rule prior to affording the public an opportunity to comment. The deadline for comments on the interim rule, which will be considered in formulating the final rule, is November 14, 2008.

Background: The Competition in Contracting Act (CICA) generally requires all federal agencies to provide for "full and open competition" when acquiring products and services. See 10 U.S.C. § 2304. FAR Subpart 6.3 describes situations in which the government is authorized to procure goods and services using other than full and open competition. Frequently used exceptions include circumstances when there is only one responsible source and no other sources will satisfy the government's needs, see FAR 6.303-1, and when there is an unusual and compelling urgency such that the government would be seriously injured if it was not permitted to restrict the number of sources. See FAR 6.303-2.

The interim rule implements Sections 886 and 892 of the National Defense Authorization Act for 2008 (the Act), Pub. L. 110-81. Section 886 provides the statutory authority for the DoD, upon a written determination, to limit competition when acquiring property and services (including construction) in support of operations in Iraq and Afghanistan. Operations include security, transition, reconstruction, and humanitarian activities. However, the acquisition of small arms is exempt from Section 886 of the Act. Instead, Section 892 reiterates the requirement to use full and open competition to the maximum extent possible for acquisitions of small arms used to support the Armies and Police Forces of Iraq and Afghanistan or other security forces of those countries.

These new limitations on competition create a scenario for other than full and open competition apart from those provided under FAR Subpart 6.3. The interim rule proposes the creation of a new DFARS Subpart 225.77, Acquisitions in Support of Operations in Iraq or Afghanistan, as well as corresponding DFARS clauses, to implement the requirements of the Act.

DFARS 225-7703—Acquisition of Products or Services Other Than Small Arms: The new DFARS 225-7703-1(a) allows the DoD to restrict competition in three ways: (1) to establish a preference for products and services from Iraq or Afghanistan, (2) to limit competition to products and services from Iraq or Afghanistan, and (3) to restrict an acquisition or class of acquisitions to a particular source or group of sources from Iraq or Afghanistan. A "product" from Iraq or Afghanistan is one that is "mined, produced, or manufactured in Iraq or Afghanistan." DFARS 225-7701. A "service" from Iraq or Afghanistan is one that is "performed in Iraq or Afghanistan predominantly by citizens or permanent resident aliens of Iraq or Afghanistan." Id. The DoD is not required to justify its decision to use one of these three procedures under FAR Subpart 6.3.

Instead, DFARS 225-7703-2 establishes two general conditions when the use of these new restricted competition procedures are permitted. First, when the products and services will only be used by the military, police, or security forces of Iraq or Afghanistan, then the contracting officer need only determine in writing that such is the case. Alternatively, when the products and services will not be limited to use by the military, police, or security forces of Iraq or Afghanistan, a senior acquisition official must determine in writing that the use of such procedures are in the national security interest of the United States.

The "national security interest of the United States" has a very limited meaning in this context. DFARS 225-7703-2(b)(1) indicates that the use of the new procedures would be in the national security interest of the United States when the "procedure is necessary to provide a stable source of jobs in Iraq or Afghanistan" and the procedure will not affect ongoing operations in Iraq or Afghanistan or affect the U.S. industrial base. There is a presumption that the use of the new procedures will not affect the U.S. industrial base.

The interim rule creates a new DFARS clause corresponding to each of the three new procedures. See DFARS 252.225-7023, -7024, and -7025. Notably, DFARS 252.225-7023, which provides for the preference for products or services from Iraq or Afghanistan, provides that the contracting officer must increase by 50 percent the price of offers of products or services that are not from Iraq or Afghanistan. In that regard, DFARS 225-7703-3 instructs that offers of a product or service from Iraq or Afghanistan must be awarded the contract when the offer is the low offer outright or as a result of the application of the price preference.

DFARS 225.7702— Acquisition of Small Arms: The new DFARS 225.7702 reinforces the pre-existing obligation under CICA that the government use full and open competition when acquiring small arms to assist Iraqi or Afghan security and police forces. "Small arms" are defined as "pistols and other weapons less than 0.50 caliber." DFARS 225.7702 provides extra protection for responsible U.S. small arms manufacturers by preventing such manufacturers from being excluded from any competition when the DoD elects to use other than full and open competition. Interestingly, DFARS 225-7702(a)(3) provides that if the DoD's justification for using other than full and open competition is FAR 6.302-2 (i.e., unusual and compelling urgency), then the government cannot exclude U.S. manufacturers or products manufactured in the United States for the "purpose of administrative expediency."

Practitioner's Tips: The interim rule implementing the requirements of the 2008 Defense Authorization Act could have significant implications for existing contractors or contractors seeking to do business with the DoD in Iraq or Afghanistan. The only industry exempt from these new procedures is small arms manufacturers.

- Service contractors, including construction contractors, should consider the advantages of employing citizens or resident aliens of Iraq or Afghanistan when these new procedures are utilized. Similarly, manufacturers might consider the potential benefits of manufacturing or producing end products in Iraq or Afghanistan to the extent feasible. Doing so may enable contractors to benefit from restricted competition or the valuable price preference during the evaluation of offers.

- Conversely, contractors should be aware of the limitations on the use of these new acquisition procedures as they may be grounds for a possible bid protest, especially as contracting officers become familiar with these new rules. For example, disappointed bidders or offerors may be able to challenge a written determination that the products or services being acquired will be limited to use by the military, police, or security forces of Iraq or Afghanistan, or that use of one of the new procedures is not necessary to provide a stable source of jobs in Iraq or Afghanistan.

- U.S. manufacturers currently supplying end products to Iraq or Afghanistan should anticipate the potential use of the DoD's new authority to restrict competition, and consider whether its industry is susceptible to competition from emerging sources in Iraq or Afghanistan.

Venable office locations

BALTIMORE, MD
750 E. PRATT STREET
NINTH FLOOR
BALTIMORE, MD 21202
t 410.244.7400
f 410.244.7742

LOS ANGELES, CA
2049 CENTURY PARK EAST
SUITE 2100
LOS ANGELES, CA 90067
t 310.229.9900
f 310.229.9901

NEW YORK, NY
ROCKEFELLER CENTER
1270 AVENUE OF THE
AMERICAS
TWENTY-FIFTH FLOOR
NEW YORK, NY 10020
t 212.307.5500
f 212.307.5598

ROCKVILLE, MD
ONE CHURCH STREET
FIFTH FLOOR
ROCKVILLE, MD 20850
t 301.217.5600
f 301.217.5617

TOWSON, MD
210 ALLEGHENY AVENUE
TOWSON, MD 21204
t 410.494.6200
f 410.821.0147

TYSONS CORNER, VA
8010 TOWERS CRESCENT DRIVE
SUITE 300
VIENNA, VA 22182
t 703.760.1600
f 703.821.8949

WASHINGTON, DC
575 SEVENTH STREET NW
WASHINGTON, DC 20004
t 202.344.4000
f 202.344.8300