
New Enhanced Competition and GAO Protest Option for Larger Task or Delivery Orders

by John E. Jensen & Daniel S. Herzfeld

Several new provisions of law now enhance the rights of federal government contractors performing under multiple-award indefinite delivery/indefinite quantity contracts. The new provisions add rigor and transparency to the procurement of task and delivery orders over \$5 million and, for task and delivery orders over \$10 million, afford disappointed offerors the right to protest those awards as a matter of course at the Government Accountability Office.

Several provisions of the National Defense Authorization Act for Fiscal Year 2008 (the “2008 Authorization Act”) took effect on May 27, 2008, enhancing the rights of government contractors performing under multiple-award indefinite delivery/indefinite quantity (“ID/IQ”) contracts. The new provisions require “enhanced competition,” including debriefings, for task and delivery orders over \$5 million. The provisions also authorize bid protests of awards of task or delivery orders over \$10 million. The new provisions constitute a break from prior law, which severely limited the ability of contractors to receive debriefings or to protest task or delivery orders.

Congress had enacted the Federal Acquisition Streamlining Act of 1994 (“FASA”) in part to encourage the use of multiple award ID/IQ contracts. In these acquisitions, agencies award contracts to numerous offerors, which minimizes the risk of protest. After the contracts are in place, the agency then awards the work pursuant to “task orders” or “deliver orders.” FASA imposed few constraints on the agencies’ award of task or deliver orders and largely barred bid protests challenging their award.

On January 28, 2008, the President signed the 2008 Authorization Act, which adopted several recommendations of an Acquisition Advisory Panel that Congress had created several years ago. In January 2007, the panel recommended that Congress enhance transparency and competition by providing greater rights to contractors in the award of task and delivery orders above \$5 million, including a right to receive a debriefing and a right to protest.

Congress adopted these recommendations with modest changes in the 2008 Authorization Act. Although the changes represent a step back from the “streamlining” goal of FASA, they will add rigor and transpar-

ency to the procurement of task and delivery orders, and presumably lead to better procurement decisions and a fairer system for federal contractors. All the changes went into effect May 27, 2008.

“Enhanced Competition” for Orders Valued Over \$5 Million

The first change is a contractor’s new rights to receive additional information during the competition, and after award, of task or delivery orders issued under a multiple-award ID/IQ contract if the order is valued over \$5 million.

FASA imposed only modest constraints on an agency’s award of task and delivery orders. Under FASA, multiple-award contract holders generally are entitled only to “a fair opportunity to be considered” for each order. The “fair opportunity” standard is a permissive one. Among the few significant constraints, the agency must announce “placement procedures” used for its orders, must have a clear statement of work, and must consider price in the award decision. The agency also must document the rationale for the award in the contract file, but must do little else.

The new statute’s “enhanced competition” rules, for orders over \$5 million, now require that all companies holding the ID/IQ contract receive the following: (1) a notice and clear statement of the agency’s requirements for a given task or delivery order; (2) a reasonable period of time to provide a proposal in response to the notice; (3) the relative weight of significant factors and subfactors the agency expects to consider in making an award, including their relative importance; (4) a written statement documenting the basis for the award; and (5) a post-award debriefing.

These new requirements will make task and delivery order procurements for orders over \$5 million look, in many respects, more like Federal Acquisition Regulation (“FAR”) Part 15 procurements, adding rigor and transparency to the procurement process.

Protests of Task & Delivery Orders Valued Over \$10 Million

The 2008 Authorization Act also added new protest authority to allow a contractor to challenge a task or delivery order issued under a multiple-award ID/IQ contract if the order is valued over \$10 million. The new authority grants the Government Accountability Office (“GAO”) exclusive jurisdiction to hear protests of such orders. Unless extended, this authority will end in three years.

FASA severely limited the ability of a contractor to protest an award of a task or delivery order. Protests were permitted only where “the order increases the scope, period, or maximum value of the contract under which the order is issued.” The GAO also ruled that it would hear protests of “downselections,” which is where an agency limits eligibility for future orders under a multiple award ID/IQ contract to only one contractor. The GAO and the U.S. Court of Federal Claims also hear protests of orders under the Federal Supply Schedule program, which involves a special type of ID/IQ contract that is not subject to FASA’s rules. The net result was that FASA barred the vast majority of challenges to task or delivery orders under multiple award ID/IQ contracts. Thus, the new rules will expose larger task and delivery order awards to outside scrutiny for the first time since FASA.

The Task and Delivery Order Ombudsman

GAO’s new jurisdiction to hear protests of awards for orders exceeding \$10 million raises several issues. One is the impact on the agency’s own internal process for resolving disputed task or delivery order awards. FASA allowed disappointed offerors to complain to the agency “task and delivery order ombuds-

man,” an infrequently used process distinct from the agency-level bid protest process. The new threat of GAO review should cause agencies to assess the efficacy of their current ombudsman review process, and its attractiveness as an alternative to filing at GAO.

The ombudsman will continue to provide the only outlet for those orders falling beneath the \$10 million protest threshold. Note that procurements falling between \$5 million and \$10 million are subject to the new “enhanced competition” rules, such as debriefings, but still cannot be protested at GAO. Where contractors, in their debriefings, now detect errors in the awards of orders in this \$5 - \$10 million range, contractors may be motivated to file ombudsman complaints relating to these orders.

Protest Timeliness and Suspending Performance of the Award

The 2008 Authorization Act raises several questions regarding the timeliness and impact of protests at GAO. The essence of the issues is whether these task order awards should be treated in the same manner as FAR Part 15 contract awards for protest purposes. Following a FAR Part 15 contract award, the debriefing becomes the trigger for a timely protest. A protest must be filed 10 days after the debriefing in order to be timely. The new law does not expressly address whether protests of task or delivery orders exceeding \$10 million will be subject to this same timeliness rule, but a fair interpretation of the statutory and regulatory scheme suggests that they will be.

Another issue concerns the potential application of the Competition in Contracting Act’s (“CICA”) automatic stay provision, which requires suspension of a contract award if the agency receives notice of a protest from GAO within five days after the debriefing. The 2008 Authorization Act does not address whether protests of task or delivery orders exceeding \$10 million will be subject to the CICA stay. If they are not, any suspension of the award would be solely up to the discretion of the agency.

\$100 Million Cap on Single Source Award of Any Task or Delivery Order Contracts

The new statute also requires the award of multiple contracts where the aggregate contract value of an ID/IQ contract will exceed \$100 million. Congress imposed this rule to ensure, for large ID/IQ contracts, that there would be competition for the award of the task or delivery orders. Agencies must make multiple awards of such large-volume contracts unless: (1) the tasks under the contract are so integrated that only a single source can perform them, (2) only one contractor is qualified, (3) the contract provides for award of only firm fixed-price orders, or (4) exceptional circumstances justify an exception in the public interest. This competition mandate is a congressional reaction to the past awards of large, single source ID/IQ contracts, including the Army’s LOGCAP contract for Iraqi operations.

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