

Government Contracts Blog

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Final Rule Issued on Enhanced Competition for Task and Delivery Order Contracts

By [Marko W. Kipa](#)

On March 19, 2009, the FAR Councils issued a final rule providing for enhanced competition for task and delivery order contracts. *See* [75 Fed. Reg. 13416](#) (Mar. 19, 2009). The final rule was the culmination of a rulemaking process that surfaced in Section 843 of the National Defense Authorization Act of 2008, Pub. L. No. 110-181 (the "Act"), which went into effect on May 27, 2008. Subsequently, on September 17, 2008, the FAR Councils issued an interim rule with request for comments. *See* [73 Fed. Reg. 54008](#) (Sept. 17, 2008). The interim rule essentially mirrored Section 843 of the Act. Comments on the interim rule were submitted by industry and government representatives on November 17, 2008.

The final rule amends several FAR provisions (FAR 16.503-16.505). It also continues to target three primary areas in providing for enhanced competition for task and delivery order contracts, which were discussed in our previous blog [article](#) and remain substantially unchanged in the final rule:

- First, the final rule authorizes protests at the GAO on any ground in connection with the award of multiple award contract task and delivery orders valued at more than \$10 million. This grant of jurisdiction is subject to a three-year sunset provision and is set to expire on May 27, 2011.
- Second, the final rule provides for enhanced competition requirements and procedures for the award of multiple award contract task and delivery orders valued at more than \$5 million. In particular, agencies will be required to provide (a) notice to contract holders of the proposed task or delivery order that includes a clear statement of requirements; (b) a reasonable proposal response period; (c) the significant evaluation factors and subfactors as well as their relative importance; (d) where award is made on a best value basis, a written statement documenting the basis for award; and (e) an opportunity for a post-award debriefing.
- Third, the final rule contains a prohibition against single award task or delivery order contracts valued at over \$100 million (including options) unless the agency-head issues a

"waiver." The agency-head only may do so upon a determination in writing that: (a) the expected task or delivery orders are so integrally related that only a single contractor can perform the work; (b) the contract provides only for firm-fixed price task or delivery orders; (c) only one source is qualified and capable of performing the work at a reasonable price; or (d) exceptional circumstances justify the public's interest in awarding the contract to a single source. In the event the agency-head relies on the "public interest" exception, Congress must be notified within 30 days.

As we also discussed in a previous blog [article](#), a majority of the comments on the interim rules took aim at the prohibition of single award task or delivered order contracts valued at over \$100 million, unless an appropriate "waiver" was obtained. The FAR Councils considered the submitted comments and made only several changes to the interim rules. Specifically, the FAR Councils highlighted the following key amendments:

- First, the FAR Councils "amended FAR 16.503(a) to clarify that a requirements contract is awarded to one contractor. This change [was] made to dispel the implication at FAR 16.503(b)(2) that a requirements contract may be awarded to multiple sources."
- Second, the FAR Councils amended the final rule to clarify that a Justification and Approval ("J&A") under FAR Subpart 6.3 was only required when an agency invoked an exception to full and open competition. The language in the interim rule could have been read to suggest that a J&A and agency-head approval were both required for any single award task or delivery order contract valued at over \$100 million.
- Third, the FAR Councils "added language [to the final rule] ... to clarify that the agency-head determination does not apply to architect-engineer task- or delivery-order contracts awarded pursuant to FAR subpart 36.6."

Agencies and government contractors have already had some time to familiarize themselves with the rule's requirements because the FAR was amended at the time the interim rule was published and the substantive provisions remain substantially unchanged in the final rule. While the FAR Councils declined to make additional changes apart from those discussed above, the final rule's regulatory history elaborates upon the FAR Councils' reasoning and provides potentially useful guidance about its interpretation of the regulatory provisions. Further guidance also will become available as the GAO and the Court of Federal Claims continue to confront "enhanced competition" issues in IDIQ bid protests. The final rule goes into effect on April 19, 2010.

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