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2008-2009

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November 17, 2008

VIA FACSIMILE AND U.S. MAIL

General Services Administration
Regulatory Secretariat (VPR)
1800 F Street, N.W. Room 4041
Washington D.C. 20405
ATTN: Laurieann Duarte
Facsimile: 202/501-4067

Re: FAC 2005-27, FAR Case 2008-006, 73 Fed. Reg. 54008 (Sept. 17, 2008)

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association (the "Section"), I am submitting comments on the above-referenced interim rule implementing Section 843 "Enhanced Competition for Task and Delivery Order Contracts" of the Fiscal Year 2008 National Defense Authorization Act ("FY08 NDAA"). The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees have members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.¹

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the

¹ Sharon L. Larkin, a member of the Section Council, did not participate in the Section's consideration of these comments and abstained from the voting to approve and send this letter.

Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.²

A. Introduction

The Section endorses the interim rule and believes that it should be implemented as a final rule, with the clarifications discussed below. The Section believes that the identified changes to Federal Acquisition Regulation (“FAR”) Part 16 proposed by the Civilian Agency Acquisition and Defense Acquisition Regulation Councils (“the Councils”) effectively implement Congress’s intent under Section 843 of the FY08 NDAA to enhance competition for task and delivery order contracts, which the Government now utilizes to acquire billions of dollars’ worth of products and services every year. In particular, the changes place effective limitations on the issuance of task or delivery order contracts over \$100 million; provide meaningful opportunity for competition for orders exceeding \$5 million, including the opportunity for post-award debriefings; and authorize protests of orders in excess of \$10 million at the Government Accountability Office – each of which allows for more transparency and accountability in contracting. This statutory provision and the implementing regulations are consistent with the Section’s Principles of Competition in Public Procurements, which urge full and open competition in federal, state, and local procurements to the maximum extent practicable and recognize that ensuring open competition is essential to the integrity of the procurement process.

B. Suggestions for Clarification of the Interim Rule

The Section believes that the final rule should clarify that a protest of a solicitation for or award of a task or delivery order timely filed in accordance with the Competition in Contracting Act (“CICA”), 31 U.S.C. § 3551 *et seq.*, should trigger an automatic stay of performance. The interim rule incorporates FAR 15.306, which requires a debriefing if timely requested. Sections 3553(c) and (d) of CICA state that “a contract may not be awarded” if the procuring agency receives notice from the Comptroller General that a protest was filed before contract award, and the agency may not authorize continued performance of a contract if it receives notice that a protest was filed either within 10 days after “contract award” or within five days after a requested and required debriefing, 31 U.S.C. § 3553(c)–(d), unless the agency issues an override determination. Nevertheless, as some practitioners have noted:

² This letter is available in pdf format at <http://www.abanet.org/contract/federal/regscmm/home.html> under the topic “Bid Protests.”

CICA does not explicitly define the term “contract award.” One could argue that protesters of task or delivery orders are not entitled to an automatic suspension of performance because of the definitions of “contract,” “task order” and “delivery order” found in the FAR. FAR 2.101 defines “contract” as “a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the government to an expenditure of approved funds” On the other hand, the terms “delivery order” and “task order” are defined as orders “placed against an established contract” and, thus, arguably do not constitute “contracts” under the FAR.

James J. McCullough, Deneen J. Melander and William S. Speros, FEATURE COMMENT: Acquisition Reform Revisited—Section 843 Protests Against Task And Delivery Order Awards At GAO, *The Government Contractor*, Vol. 50, No. 9, (Mar. 5, 2008) (hereinafter “*Acquisition Reform Revisited*”). Consistent with Congress’s intent to foster competition for task and delivery order contracts and to help ensure transparency, accountability and integrity in the contracting process, the Section recommends that the Councils clarify the interim rule to provide that a timely filed pre- or post-award protest triggers the stay of performance under CICA.

The Section further recommends that the Councils clarify the monetary threshold for a protest of a task or delivery order. As noted in *Acquisition Reform Revisited*:

Section 843 does not provide any express guidance on how the parties should value task or delivery orders when determining whether an order exceeds the threshold value for purposes of protest jurisdiction. This lack of clarity could lead to challenges to GAO’s authority to hear a protest. For example, if an agency relies on market research to value a solicitation for a task or delivery order at just under \$10 million, but all quotes, including the intended awardee’s, are priced over \$10 million, would GAO have jurisdiction to hear the protest? A similar problem might arise if the agency awards the

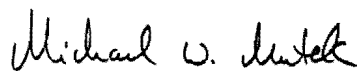
order for \$9.9 million, and GAO must consider whether to exercise jurisdiction over a protest based on allegations that the protester's \$10.1 million proposal was technically superior, i.e., "but for" the agency's unreasonable actions, the order would have exceeded \$10 million.

Id. The Section recommends that the Councils clarify how the monetary threshold for a task or delivery order protest will be calculated. For example, the Councils could consider clarifying that the \$10 million dollar threshold is based upon the offers received by the agency so that agencies cannot avoid protest jurisdiction by valuing a solicitation slightly under the statutory threshold and so that protest jurisdiction is not affected by adjustments made to offers during the course of the evaluation.

C. Conclusion

The Section supports Congress's and the Councils' efforts to increase competition for task and delivery orders and to limit single award task or delivery order contracts greater than \$100 million. The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,



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Chair, Section of Public Contract Law

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