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GOVERNMENT CONTRACTS IDIQ TASK ORDER JURISDICTION LIMITS MADE PERMANENT

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If you participate in the government contracts universe, you know the law affords you the opportunity to pursue bid protests. Bid protests are generally disputes involving either (a) the terms of a solicitation (invitation for bid under FAR Part 14 or a Request for Proposals under FAR Part 15) (a Pre-award protest) or (b) some dispute with the way an award was made or party excluded (a Post-award protest).

Traditionally, contracts were awarded by the U.S. Government on a "one off basis" in which the government purchased a good, service or product using a single purchase vehicle. More recently, however, the Government has utilized IDIQ or indefinite delivery/indefinite contracts to "prequalify" contractors and then make awards in the form of a task order or delivery order.

Whether called a JOC (Job Order Contract), TOC (Task Oder Contract), MATOC (Multiple Award Task Order Contract) or other like name, each of these vehicles effectively have offerors submit proposals and become pre-qualified by having a competitive range developed. Under this scenario, the general terms and often certain cost elements of performing various tasks are pre-negotiated as part of this qualification process. After that first step, the agency can then issue a task order for a specific purchase or performance obligation. By way of example, the government may pre-approve a group of construction contractors to perform work in a given region or for a certain type of repetitive building. That approved group constitutes the competitive range under which pricing for labor, services (such as on a unit price basis) and other terms are agreed upon. Thereafter, the agency will issue a request for proposal to award a task order under which a given location, building type, design and other project-specific terms are included. Following a competition (or in the right scenario, a sole source award), a task order is entered into for that specific project.

This method of contracting allows the government to have a stable of contractors standing by and most of the terms of the given project's contract already negotiated in an effort to speed up procurements. While a favorable tool that is widely used in the commercial realm, there is one substantial negative in the gov con world: it is difficult to protest a task order. Congress has historically limited bid protests of task orders to certain circumstances. As a result, agencies will likely use IDIQ contracts to avoid future bid protests by making task order awards.

The history of task order protest jurisdiction is long and convoluted. There have been differing thresholds that were subject to sunset provisions and reauthorizations. Under this framework, protesters have sometimes found themselves caught "in between" and been left without adequate protest remedies. As

of yesterday, May 31, however, a final rule that was published on May 1, 2018, went into effect changing the threshold for non-civilian task and delivery orders. This change brings the FAR in line with the changes of the National Defense Authorization Act for Fiscal Year 2017. As a result, protests against DoD, NASA and Coast Guard task and deliver orders are now limited to only those exceeding a dollar threshold of $25 million. Civilian agencies are only subject to protests on task or delivery orders that exceed $10 million. See, 83 Fed. Reg. 19145 (May 1, 2018). In determining which agency controls for jurisdictional purposes, GAO will look to the agency that awarded the underlying IDIQ contract as opposed to the agency that issues the task order.

Another point to remember with these thresholds is that in most instances, the U.S. Government Accountability Office (GAO) holds exclusive jurisdiction over Task and Delivery Order protests. There are exceptions to this rule and one such recognized exception that allows one to protest arises out of the situation where a Task or Delivery Order's scope of work is so far outside the scope of the base IDIQ contract that it can be protested based on the fact that it should have been openly competed and is not within the IDIQ contract's reasonable scope. The practical impact of this is that when considering to protest a task or delivery order, contractors must not only be sure that the threshold requirement is satisfied, but also that GAO's strict timeliness requirements are satisfied. Whereas a party that missed the deadline on a GAO protest might have had the opportunity to go to the Court of Federal Claims on other procurements, they will not necessarily have that option with task and delivery orders except under limited circumstances.

The bottom line is that while IDIQ contracts can be favorable to both the government and contractors alike, one must be ever vigilant to make sure that you are aware of the type of contract vehicle you are holding and what, if any, protest rights you may (or may not) possess.