

MAY 28 2008



Homeland  
Security

MEMORANDUM FOR: HEADS OF CONTRACTING ACTIVITIES

FROM: Thomas Essig *Thomas W Essig 5/28/08*  
Chief Procurement Officer

SUBJECT: Class Deviation from Federal Acquisition Regulation  
(FAR) 16.5, Enhanced Competition for Task and Delivery  
Order Contracts

**Purpose:**

To issue a class deviation from the requirements of FAR 16.504 and 16.505 necessary to permit compliance with Section 843 of the FY 2008 National Defense Authorization Act.

**Effective Date:**

Immediately

**Background:**

Section 843 of the Fiscal Year 2008 National Defense Authorization Act (NDAA) stipulates several requirements regarding enhancing competition within federal contracting. The provisions of Section 843 include (1) Limitation on single award task and delivery order contracts greater than \$100 million (2) Enhanced competition for task and delivery orders in excess of \$5 million; and (3) Protest on orders valued in excess of \$10 million that the Comptroller General shall have exclusive jurisdiction over such protests. Current FAR 16.504 and 16.505 are not consistent with those requirements and the attached class deviation has been approved to authorize and provide temporary policies necessary to comply with the requirements of Section 843.

**Expiration Date:**

This class deviation will remain in effect until publication of the amendments to the FAR that implement Section 843.

**DHS Class Deviation 08-02 from the Federal Acquisition Regulation (FAR)  
FAR 16.5, Indefinite Delivery Contracts**

**Enhanced Competition for Task and Delivery Order Contracts – Section 843 of the Fiscal  
Year 2008 National Defense Authorization Act**

**DETERMINATION AND FINDINGS:**


Section 843 of the FY08 National Defense Authorization Act (NDAA) stipulates several requirements regarding enhancing competition within federal contracting. The provisions of Section 843 include (1) Limitation on single award task and delivery order contracts greater than \$100 million (2) Enhanced competition for task and delivery orders in excess of \$5 million; and (3) Protest on orders valued in excess of \$10 million that the Comptroller General shall have exclusive jurisdiction over such protests.

**FINDINGS:**

Section 843 is effective May 27, 2008. The amendments to the Federal Acquisition Regulation necessary to implement Section 843 have been reviewed by the Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DARC), but the amendments to the FAR will not be promulgated prior to May 27, 2008. Accordingly, until necessary amendments to the FAR are made, it is necessary to grant a class deviation from the current FAR to authorize all DHS components to deviate from the portions of the FAR that conflict with Section 843 and to use temporary policies necessary to implement section 843 requirements.

**DETERMINATION:**

In accordance with FAR 1.404, I hereby grant a class deviation from the requirements of FAR 16.504 and 16.505 necessary to permit compliance with Section 843, as described in the attached temporary policies. As required by FAR 1.404, consultation with the chairperson of the Civilian Agency Acquisition Council (CAAC) for this deviation occurred at the May 21, 2008, CAAC meeting. Written confirmation of this consultation is to be provided by the CAAC and it will be placed in the administrative file for this deviation when it is received. This class deviation shall remain in effect until promulgation of FAR amendments implementing Section 843.

  
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Thomas W. Essig  
Chief Procurement Officer

Department of Homeland Security

5/28/08  
\_\_\_\_\_  
Date



**TEMPORARY POLICIES IMPLEMENTING THE REQUIREMENTS OF SECTION 843 OF  
THE FISCAL YEAR 2008 NATIONAL DEFENSE AUTHORIZATION ACT**

DHS components shall comply with the following temporary policies in place of existing FAR policies per DHS class deviation 08-02 from FAR 16.5 until the Federal Acquisition Regulation is amended to implement Section 843 of the Fiscal Year 2008 National Defense Authorization Act.

Part 16—Types of Contracts

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Subpart 16.5 -- Indefinite-Delivery Contracts

\* \* \* \* \*

16.504(c)(1)(ii)(D) No task or delivery order contract in an amount estimated to exceed \$100 million (including all options) may be awarded to a single source unless—

- (1) The Chief Procurement Officer determines in writing that –
  - (a) The task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;
  - (b) The contract provides only for firm-fixed price (See FAR 16.202) task or delivery orders for—
    - (i) Products for which unit prices are established in the contract; or
    - (ii) Services for which prices are established in the contract for the specific tasks to be performed;
  - (c) Only one source is qualified and capable of performing the work at a reasonable price to the Government; or
  - (d) It is necessary in the public interest to award the contract to a single source due to exceptional circumstances.
- (2) The Chief Procurement Officer notifies Congress within 30 days after any determination under (D)(1)(d).
- (3) The requirement for a determination for a single award contract greater than \$100 million applies in addition to the requirements of subpart 6.3.

\* \* \* \* \*

16.505 Ordering.

(a) General.

\* \* \* \* \*

- (9)(i) No protest under subpart 33.1 is authorized in connection with the issuance or proposed issuance of an order under a task-order contract or delivery-order contract, except for--
  - (A) A protest on the grounds that the order increases the scope, period, or maximum value of the contract, or

(B) A protest of an order valued in excess of \$10 million. Protests of orders in excess of \$10 million may only be filed with the General Accountability Office, in accordance with the procedures at 33.104.

(ii) The authority to protest the placement of an order under this subpart expires on May 26, 2011. (10 U.S.C. 2304a(d) and 2304c(d), and 41 U.S.C. 253h(d) and 253j(d)).

(b) Orders under multiple award contracts—

(1) Fair opportunity.

(i) The contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding \$3,000 issued under multiple delivery-order contracts or multiple task-order contracts, except as provided for in paragraph (b)(2) of this section.

(ii) \* \* \*

(iii) Orders exceeding \$5 million. For task or delivery orders in excess of \$5 million, the requirement to provide all awardees a fair opportunity to be considered for each order shall include, at a minimum:

(A) A notice of the task or delivery order that includes a clear statement of the agency's requirements;

(B) A reasonable response period;

(C) Disclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating proposals, and their relative importance; and

(D) Where award is made on a best value basis, a written statement documenting the basis for award and the relative importance of quality and price or cost factors; and

(E) An opportunity for a postaward debriefing in accordance with (b)(4).]

(iv) \* \* \*

\* \* \* \* \*

(4) *Postaward Notices and Debriefing of Awardees for Orders Exceeding \$5 million.* The contracting officer shall notify unsuccessful awardees when the total price of a task or delivery order is \$5 million or more, including options.

(i) The procedures at 15.503(b)(1) shall be followed when providing postaward notification to unsuccessful awardees.

(ii) The procedures at 15.506 shall be followed when providing postaward debriefing to unsuccessful awardees.

(iii) A summary of the debriefing shall be included in the task or delivery order file.]

(5) \* \* \*

(6) \* \* \*