End of Fiscal Year Procurement Strategies

It is that time once again, as we approach the end of the government’s fiscal year, for agency procurement personnel to try to liquidate appropriated funding that has not yet been programmed, in order to avoid a potential budget reduction in the following fiscal year. At least three things will be happening in most government procurement shops over the last few months of the year: (1) a concerted push to complete acquisitions that were started earlier in the year to get those contracts awarded before September 30; (2) a close review of agency budgets to identify unobligated procurement funds; and (3) a fresh look at program requirements to identify potential requirements not yet funded. These actions are undertaken so that agencies can fully spend down their appropriated funding in order to avoid a reduction in future funding. The challenge that is usually encountered is how to fill a new or expanded requirement in such a short time frame, knowing that a competitive procurement could take a year or more to conduct. So what can agencies do to fully liquidate appropriated funding short of having to conduct a full and open competition or even a restricted competition? Well, there are exceptions that enable agency personnel, under limited circumstances, to forgo competition. We discuss below several potentially applicable exceptions that could provide the agency a path forward for funding end-of-year requirements without having to conduct a formal competition.

Exceptions to the Requirement for Full and Open Competition

One of the fundamental policies underlying the Federal Acquisition Regulation (FAR) is that federal agencies must utilize competitive procedures to the maximum extent possible when procuring goods and services. FAR Subpart 6.1. But there are six general exceptions to the requirement for full and open competition, and of those, two may be especially helpful when planning end-of-year expenditures:

(1) Simplified acquisition procedures and (2) statutorily authorized contracting procedures.

Also, there are seven other procurement scenarios where agencies may elect to use “other than full and open competition.” Among those is the scenario where there is but one source available to meet the agency’s requirements within the time frame specified. FAR 6.302-1.

Contracts Awarded Using the Simplified Acquisition Procedures

 Agencies may use simplified acquisition procedures (SAT) when the contract value falls below certain thresholds that are dependent on the nature of the requirement. One such requirement that gives rise to an increased threshold involves support of “contingency” operations. A contingency operation is a military operation that “[1] Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations or hostilities against an enemy of the United States or against an opposing military force; or [2] results in the call or order to, or retention on, active duty members of the uniformed services … or any other provision of law during a war or during a national emergency declared by the President or Congress.” 10 U.S.C. § 101(a)(13). At present, DOD is involved in hostilities in at least two known foreign countries (Afghanistan and Iraq), both of which involve hostile actions directed at the U.S. and its allies. As such, troops from any National Guard installation may, at any time,
become involved in such actions. This arguably gives rise to a justification to use the upper SAT limits associated with contingency operations.

The determination of whether the requirements support a contingency operation must be made by the procuring agency. In the absence of a justification to use the upper SAT limits for contingency operations, the lower thresholds would govern (micro-purchase threshold and SAT threshold set at $150K).

1. **Contracts Awarded at or Below the Micro-purchase Threshold**

The micro-purchase threshold is generally $3,000 per order, except for acquisitions for services or supplies to be used in support of contingency operations, in which case the limit is $15,000 for contracts awarded and performed inside the continental U.S. (CONUS), and $30,000 for contracts awarded and performed outside the continental U.S. (OCONUS). However, the micro-purchase threshold is reduced to $2,500 per order for services that are subject to the Services Contract Act (SCA). Certain services, such as medical and dental, should be exempt from SCA coverage under the professional and administrative services exemption. 29 C.F.R. § 4.156. If the contract is performed primarily by administrative or professional personnel or by executives, the entire contract should be exempt from SCA coverage. The Department of Labor informally applies an 80% rule of thumb, meaning that so long as not less than 80% of the contract services are performed by exempt employees, the contract is excluded from SCA coverage.

2. **Contracts Awarded at the Simplified Acquisition Threshold**

The simplified acquisition threshold is generally $150,000 per order, except for acquisitions for services or supplies to be used in support of contingency operations, in which case the limit is $300,000 for CONUS contracts and $1 million for OCONUS contracts.

3. **Simplified Acquisition Threshold for Commercial Items**

The FAR also authorizes awards of up to $6.5 million for the acquisition of commercial items (supplies and services). The higher threshold requires additional agency documentation, including a written justification for any sole source award. FAR 13.501(a)(1).

**Statutory Contracting Procedures**

The Federal Supply Schedule (FSS) program, also known as the GSA Schedules Program or the Multiple Award Schedule (MAS) Program, is expressly authorized by statute. 41 U.S.C. § 253, 40 U.S.C. § 501. Agencies placing orders against an FSS contract are exempt from the full and open competition requirements and immune from FAR Parts 13, 14, 15 and 19. Blanket Purchase Agreements (BPAs) and orders placed against an MAS contract under FAR Subpart 8.4 are considered to be issued using full and open competition. For the acquisition of supplies and services that are listed on the FSS contract at fixed unit prices for specific tasks or activities, such as diagnostic or clinical treatment services, orders exceeding the simplified acquisition threshold must be competed among schedule holders offering the same services. FAR 8.405-1(d)(1); FAR 8.405-2(c)(3)(i).

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