



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 16

[FAC 2005-98; FAR Case 2017-007; Item I; Docket No. 2017-0007, Sequence No. 1]

RIN 9000-AN41

**Federal Acquisition Regulation: Task- and Delivery-Order
Protests**

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2017 to raise the threshold for task- and delivery-order protests from \$10 million to \$25 million (applicable to DoD, NASA, and the Coast Guard) and to repeal the sunset date for the authority to protest the placement of an order (for the other civilian agencies), which was also previously repealed by the GAO Civilian Task and Delivery Order Protest Authority Act of 2016.

DATES: Effective: [Insert date 30 days after date of publication in the FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Mr. Charles Gray,
Procurement Analyst, at 703-795-6328, for clarification of
content. For information pertaining to status or
publication schedules, contact the Regulatory Secretariat
Division at 202-501-4755. Please cite FAC 2005-98, FAR
Case 2017-007.

SUPPLEMENTARY INFORMATION:

I. Background

Section 835 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328) was enacted December 23, 2016. Section 835(a) amended 10 U.S.C. 2304c(e)(1)(B) to raise the threshold for task- and delivery-order protests from \$10 million to \$25 million (applicable to DoD, NASA, and the Coast Guard). Section 835(b) amended 41 U.S.C. 4106(f) to repeal the sunset date of September 30, 2016, of the authority to protest the placement of an order (for the other civilian agencies). The sunset date was already repealed on December 14, 2016, by the GAO Civilian Task and Delivery Order Protest Authority Act of 2016 (Pub. L. 114-260).

II. Discussion and Analysis

This final rule amends FAR 16.505(a)(10) to raise the threshold for DoD, NASA, and the Coast Guard from \$10

million to \$25 million and remove the sunset date for the other civilian agencies.

III. Expected Cost Savings

The rule is administrative in nature - it follows the statute exactly, raising a threshold and removing a sunset date.

Currently, FAR 16.505(a)(10)(i) prohibits any protest in connection with the issuance or proposed issuance of an order under a task-order contract or delivery-order contract, except for a protest on the grounds that the order increases the scope, period, or maximum value of the contract; or the order is valued in excess of \$10 million. This FAR change implements section 835 of the National Defense Authorization Act for Fiscal Year 2017 to—

- Raise the threshold at which a protest may be filed at the Government Accountability Office (GAO) for task or delivery orders from \$10 million to \$25 million, applicable only to DoD, NASA, and the Coast Guard; and
- Remove the sunset date (September 30, 2016) for the authority to protest the placement of an order for agencies other than DoD, NASA, and the Coast Guard.

Although, according to GAO, there are fewer than 10 protests per year of procurements between \$10 million and

\$25 million, the higher threshold for protests of task or delivery orders for DoD, NASA, and the Coast Guard will result in savings for GAO and the affected Executive branch agencies, because there will no longer be protests of orders valued between \$10 million and \$25 million based on dollar value. While it is difficult to quantify, the lost benefit to interested parties who will lose the right to protest as a result of this rule is likely de minimis, given the historical data from GAO indicating a small number of protests in the affected dollar range. Further, there are some benefits to offerors or contractors who win awards and will no longer need to expend resources defending challenges to the award. Therefore, the net burden of this rule is estimated as less than zero, though the FAR Council is not able to monetize cost savings.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not add any new solicitation provisions or clauses, or impact any existing provisions or clauses.

V. Publication of this final rule for public comment is not required by statute

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is the Office of

Federal Procurement Policy statute (codified at Title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it follows the statute exactly, raising a threshold and removing a sunset date.

VI. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not

subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VII. Executive Order 13771

Pursuant to E.O. 13771, this rule is a deregulatory action. Information on the expected cost savings of this action can be found in section III of the preamble.

VIII. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section V. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

IX. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 16

Government procurement.

Dated: April 25, 2018.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are amending 48 CFR part 16 as set forth below:

PART 16—TYPES OF CONTRACTS

1. The authority citation for part 16 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Amend section 16.505 by revising paragraph (a)(10) to read as follows:

16.505 Ordering.

(a) * * *

(10)(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—

(A) A protest on the grounds that the order increases the scope, period, or maximum value of the contract; or

(B) (1) For agencies other than DoD, NASA, and the Coast Guard, a protest of an order valued in excess of \$10 million (41 U.S.C. 4106(f)); or

(2) For DoD, NASA, or the Coast Guard, a protest of an order valued in excess of \$25 million (10 U.S.C. 2304c(e)).

(ii) Protests of orders in excess of the thresholds stated in 16.505(a)(10)(i)(B) may only be filed with the Government Accountability Office, in accordance with the procedures at 33.104.

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Billing Code: 6820-EP

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