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Developments

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Industry And Government Officials Discuss Service Contracting Rules And Reforms

Representatives from Government, industry, and academia spoke candidly during *The Future of Services Contracting: Section 803 and Beyond* seminar at the George Washington University Law School in Washington, D.C., on February 4. Senior Vice President and Counsel of the Professional Services Council Alan Chvotkin, and officials of the Defense Procurement and Office of Federal Procurement Policy gave varying views on the implications of the National Defense Authorization Act for Fiscal Year 2002 § 803—Competition Requirement for Purchase of Services Pursuant to Multiple Award Contracts. Associate Professor Christopher R. Yukins began the seminar with an in-depth overview of § 803 service contracting reforms, explaining the basic rules and potential impacts of implementing the rule.

An OFPP official followed up with a discussion of efforts to improve task order contracting in general. For example, work is continuing on the Interagency Contract Directory to help agencies identify the various contracts available for multi-agency use. See 44 GC ¶ 73. A proposed FAR rule describing the Directory, published in the *Federal Register* on February 15, 2002, would require Government contracting activities to enter information about an interagency contract award in an online database within 10 days of awarding a Federal Supply Schedule, Government-wide acquisition contract, or other multi-agency procurement. The official said that this Directory is intended to improve agencies' market research abilities and acquisition planning, which is an important first step in effective contracting. The Directory will highlight available multi-agency contracting vehicles, so that agencies will be better able

to identify whether there are suitable existing contracts as they consider options for fulfilling their needs. The database will most likely include basic information about available services (and supplies), socio-economic information, an indication of agencies that may place orders on the contract, and applicable administrative fees. This Directory is part of the Integrated Acquisition Environment e-Gov initiative managed by the General Services Administration. A GSA official said that agencies will be expected to begin populating the directory in the spring, and the database should be functional this summer.

A Defense Procurement official also spoke at the conference to give the Department of Defense view on the issues surrounding the new service contracting rule. See 44 GC ¶ 424. The official clarified several DOD policies regarding service acquisition. For instance, when performing market research on FSS holders during the source selection process, Contracting Officers often use contractors' websites to better understand their offerings and capabilities. That research allows COs to narrow the field to contractors that will be best suited to the agency's needs. In addition, the panel members discussed what it means to "contact all" schedule holders under the rule. The Defense Procurement official noted that while the rule mentions e-Buy as one way to provide fair notice to all contractors, other mediums that provide fair notice to all—in the CO's best judgment—may be used.

It was apparent from the conference presentations that DOD acquisition personnel are aware that there are difficulties with implementing the new limitations and policy on purchasing services. To overcome these difficulties, the Defense Procurement and Acquisition Policy Office has issued guidance on § 803 on its website at <http://www.acq.osd.mil/dpad/interest/section803.htm>. The

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guidance explains the basic requirements of the Defense Federal Acquisition Regulation Supplement rule on service contracts and provides a link to the related Defense Acquisition University on-line training module.

In addition, Alan Chvotkin of the PSC gave an industry view of the § 803 rule. Chvotkin said that while agencies have made an overall “good faith effort” to implement the rule, some “games” continue. He was also concerned with the rule’s negative impact on small businesses and set-asides, and the possible implications for GSA’s schedules programs. Also, Chvotkin noted that the rule might create new grounds for protest. Although task orders are not generally subject to protest, the new rule’s special requirement that agencies ensure the receipt of at least three FSS-holder offers could create a special circumstance warranting protest. Furthermore, the requirements that all contractors must be provided with a “fair opportunity” to make an offer and that all responding contractors’ offers be fairly considered, could provide new grounds for protest. Chvotkin concluded that continued oversight of agencies’ § 803 implementation is necessary, given the differing interpretations of the statutory provisions and the new legal issues raised by the rule.

Professor Steven L. Schooner concluded the forum with a few observations of current trends in Government contracting. Schooner noted that, with the proliferation of contracting vehicles and as more agencies are removed from the process—such as the Department of Homeland Security—Government contracting has become less uniform. Also, Professor Schooner said that there will continue to be problems with adhering to contracting rules because the acquisition workforce was eviscerated during the 1990s. As a result, with the heightened demand for outsourcing and performance contracts, there are not enough people to do the increased amount of work required to award and administer service contracts.

◆ **Note**—For a detailed discussion of § 803, see Tomanelli, FEATURE COMMENT, “New Law Aims To Increase Competition For And Oversight Of DOD’s Purchases Of Services On Multiple Award Contrats,” 44 GC ¶ 107; Burke & Dees, FEATURE COMMENT, “The Impact Of Multiple-Award Contracts On The Underlying Values Of The Federal Procurement System,” 44 GC ¶ 431.

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