



**GOVERNMENT AND CONSTRUCTION  
CONTRACTS GROUP**

# **CLIENT ALERT**

**APRIL, 2002**

## **FEDERAL PROCUREMENT AFTER SEPTEMBER 11TH**

The tragic events of September 11th have had a dramatic impact on American life and American business, including the business of Federal contracting. As the Government's focus has shifted to the war on terrorism and to homeland security, its demand for related goods and services has increased and, in many cases, become urgent. To support these new missions, Government officials must often move quickly and decisively in making procurement decisions to support soldiers in the field or those otherwise responsible for national security. Although the general rule in government procurement calls for "full and open competition" in purchasing, exceptions apply in emergency and wartime situations.

Contractors doing business with the Government, or those firms selling items that could be useful in this new environment, need to understand the various laws and regulations that may be implicated in such procurements. First, because there are many exceptions and iterations set forth in the Federal Acquisition Regulations and procurement statutes, both the agency and the contractor are best served if the contractor can assist its Government customer in identifying any applicable exception to competition under which its goods or services can be procured. Second, and perhaps more importantly, contractors in competitive industries should understand when the use of expedited procurement methods is not authorized or appropriate. This information may be critical if a contractor suspects that the use of an exception to the "full and open competition" requirement may not be justified in the award of a contract to one of its competitors.

Although new legislation and regulations have been proposed to further expedite the contracting process, existing procurement statutes and regulations are sufficiently flexible to allow agencies to respond quickly when the circumstances dictate. This was the message in a Memorandum from Brigadier General Darryl A. Scott of the United States Air Force (USAF) to USAF contracting personnel not to wait for the passage of new legislation but instead to utilize the existing authority and "get on with it." See Enduring Freedom Memo EF-01-01, Rapid, Agile Contracting Support During Operation ENDURING FREEDOM (Oct. 5, 2001) (available at: [www.safaq.hq.af.mil/contracting/policy/enduringfreedom.cfm](http://www.safaq.hq.af.mil/contracting/policy/enduringfreedom.cfm)). Among the applicable existing

authorities noted in General Scott's Memorandum are exceptions to "full and open competition" including:

- ◆ The "Unusual and Compelling Urgency" exception, which applies "when the agency's need for the supplies or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals." (See 48 CFR § 6.302-2)
- ◆ The "National Security" exception, which applies when "the disclosure of the agency's needs would compromise the national security" of the United States. (See 48 CFR § 6.302-6)
- ◆ The "Public Interest" exception, which applies when the agency head determines that "full and open competition" is not in the public interest in the particular acquisition concerned. (See 48 CFR § 6.302-7)

The authorities cited above are not a complete list of the authorities that could be implicated in the current environment (nor a complete list of authorities identified in General Scott's Memorandum). In addition to exceptions to "full and open competition," existing statutes and regulations authorize agency contracting officials to quickly change the terms of existing contracts and even to expedite the start of work before a formal contract has been executed. In all such situations, contractors have rights and responsibilities of which they should be aware prior to taking any unusual action. Among the dangers to consider in this regard is that a contractor may waive its right to compensation for work performed if that work is not properly authorized by the Government at the time it is performed.

In addition to the existing authority available to Federal agencies to react to the current environment, new legislation and polices have been introduced in the wake of the September 11th tragedy. These may also provide for exceptions to competition in certain situations. Although we have not attempted to present an exhaustive list of such new authorities, some of these include:

- ◆ Section 836 of the National Defense Authorization Act for Fiscal Year 2002, Public Law 107-107, gives the Department of Defense increased flexibility in contracting for items under simplified acquisition procedures generally applicable to smaller procurements. The Act increases the micropurchase threshold to \$15,000 for procurements "to facilitate the defense against terrorism or biological or chemical attack against the United States"; and increases the simplified acquisition threshold to \$250,000 for such procurements inside the United States, and \$500,000 for such procurements outside the United States, in support of such contingency operations.
- ◆ The Act also authorizes biotechnology items or services to be procured as commercial items. Commercial item treatment gives the contracting agency much flexibility as it procures items or services, which in turn makes it easier for interested potential contractors to become involved in the government market.

Please contact Isidor Kim at (404) 572-6843 or Lorenzo Exposito (202) 624-7238 for more information about these contracting authorities.