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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

[FAR Case 2021-009; Docket No. FAR-2021-0010; Sequence No. 1]

RIN 9000-AO26

**Federal Acquisition Regulation: Protests of Orders Set Aside
for Small Business**

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

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement regulatory changes made by the Small Business Administration to update and clarify requirements associated with size and/or socioeconomic status protests in connection with multiple-award contract set-asides and reserves and orders placed under multiple-award contracts.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2021-009 to the Federal eRulemaking portal at <https://www.regulations.gov> by searching for "FAR Case 2021-009". Select the link "Comment Now" that corresponds with "FAR Case 2021-009". Follow the instructions provided on the "Comment Now" screen. Please include your name, company name (if any), and "FAR Case 2021-009" on your attached document. If your comment cannot be submitted using <https://www.regulations.gov>, call or email the points of contact in the FOR FURTHER INFORMATION CONTACT section of this document for alternate instructions.

Instructions: Please submit comments only and cite "FAR Case 2021-009" in all correspondence related to this case. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. Public comments may be submitted as an individual, as an organization, or anonymously (see frequently asked questions at <https://www.regulations.gov/faq>). To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Dana Bowman, Procurement Analyst, at 202-803-3188 or by email at dana.bowman@gsa.gov, for clarification of content. For information pertaining to status,

publication schedules, or alternate instructions for submitting comments if <https://www.regulations.gov> cannot be used, contact the Regulatory Secretariat Division at 202-501-4755 or GSARegSec@gsa.gov. Please cite FAR Case 2021-009.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the FAR to implement regulatory changes made by the Small Business Administration (SBA), in its final rules published in the Federal Register on October 2, 2013 (78 FR 61113), October 16, 2020 (85 FR 66146), and on November 29, 2022 (87 FR 73400). SBA added clarifying language at 13 CFR 121.1004 to specify when size protests must be submitted for the set aside or reserve of a multiple-award indefinite-delivery indefinite-quantity (IDIQ) contract and for orders that are set-aside for small business under an unrestricted multiple-award IDIQ contract, except for orders and blanket purchase agreements placed under a Federal Supply Schedule contract in accordance with FAR 8.405. In addition, in its final rule published on October 16, 2020, SBA amended 13 CFR 126.801, 13 CFR 125.28 (now at 13 CFR 134.1004), and 13 CFR 127.603 to authorize socioeconomic protests for set-aside orders for HUBZone, SDVOSB, or EDWOSB/WOSB concerns placed under a multiple-award IDIQ contract this is not partially or totally set aside or reserved for that particular socioeconomic

category. SBA's rule also clarified the SBA entities that may file a size protest in connection with a particular procurement. In addition, SBA's final rule published on November 29, 2022 (87 FR 73400) amended its regulations to remove references to the SDVOSB program at 13 CFR Part 125 and relocate them to 13 CFR Part 128 and 13 CFR Part 134.

II. Discussion and Analysis

This rule proposes to modify FAR subpart 19.3 to implement SBA's final rule as follows:

-Modify FAR 19.302(a)(2) to add a reference to SBA's regulations at 13 CFR 121.1001(a)(1) to clarify the entities that may file a protest in connection with a particular procurement;

-Modify FAR 19.302(d)(1) to implement SBA's regulations at 13 CFR 121.1004(a)(2) to specify when size protests are due for partial set asides and reserves of multiple-award contracts and orders that are set aside under an unrestricted multiple-award contract, with the exception of orders and blanket purchase agreements placed under Federal Supply Schedule contracts;

-Modify FAR 19.306, 19.307, and 19.308 to implement SBA's regulations at 13 CFR 126.801(d), 13 CFR 134.1004(a), and 127.603(c), respectively, to specify when protests are due for orders placed under multiple-award contracts where the contracting officer requested rerepresentation;

-Modify FAR 19.306, 19.307, and 19.308 to implement SBA's regulations at 13 CFR 126.801(d), 13 CFR 134.1004(a), and 13 CFR 127.603(c), respectively, to specify when protests are due for orders that are set aside for HUBZone small business concerns, service-disabled veteran-owned small business concern (SDVOSB), and economically disadvantaged women-owned small business concerns and women-owned small business concerns under a multiple-award contract that is not itself partially or totally set-aside or reserved for the particular concern. This does not apply to orders and blanket purchase agreements placed under Federal Supply Schedule contracts.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items), or for Commercial Services

This rule does not create new solicitation provisions or contract clauses or impact any existing provisions or clauses.

IV. Expected Impact of the Rule

This proposed rule implements SBA's final rules issued on October 2, 2013, (78 FR 61113), October 16, 2020, (85 FR 66146) and November 29, 2022 (87 FR 73400) to update and clarify regulations regarding size and socioeconomic status protests associated with orders placed under multiple-award contracts, with the exception of orders and blanket purchase agreements

placed under Federal Supply Schedule contracts in accordance with FAR 8.405. This proposed rule will allow contracting officers, SBA, and interested parties to protest the size of a concern for partial set asides and reserves of multiple-award contracts and orders that are set aside under multiple-award contracts. The proposed rule will allow contracting officers, SBA, and interested parties to protest the socioeconomic status of a HUBZone small business concern, an economically disadvantaged women-owned small businesses and women-owned small businesses, or a service-disabled veteran-owned small business concern for orders set aside for one of these socioeconomic categories when placed against a multiple-award contract that is not partially or totally set aside or reserved for that socioeconomic category. This proposed rule will also allow contracting officers, SBA, and interested parties to protest an order placed against a multiple-award contract where the contracting officer requested rerepresentation for the order. This proposed rule is expected to help contracting officers and interested parties to understand the requirements for filing size and socioeconomic status protests for orders placed under multiple-award contracts. Given that this proposed rule clarifies protest requirements and reduces ambiguities for small business entities and procuring activities, any impact is expected to be beneficial to both Government, contractors, and

offerors. Any cost to the Government is not expected to be significant.

V. 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.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601-612, because this proposed rule clarifies size and socioeconomic protest requirements associated with multiple-award contracts and is expected to assist both small entities and the Government in submitting a timely protest. However, an

Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement regulatory changes made by the Small Business Administration (SBA) in its final rules dated October 2, 2013 (78 FR 61113), October 16, 2020 (85 FR 66146), and November 29, 2022 (87 FR 73400). This rule proposes to update and clarify requirements associated with size and socioeconomic status protests related to partial set asides and reserves of multiple-award indefinite-delivery indefinite-quantity (IDIQ) contracts, and protests related to orders placed against multiple-award IDIQ contracts with the exception of blanket purchase agreements and orders placed under Federal Supply Schedule contracts.

The objective of this proposed rule is to implement SBA's final rules published on October 2, 2013 (78 FR 61113), October 16, 2020 (85 FR 66146), and November 29, 2022 (87 FR 73400) to clarify the requirements for size and/or socioeconomic status protests for orders placed against multiple-award IDIQ contracts. This proposed rule clarifies the timelines for an interested party to submit a size protest for a partial set aside or reserve of a multiple-award IDIQ contract and for an order placed under a multiple-award IDIQ contract. In addition, this rule clarifies when a socioeconomic status protest of a set-aside order placed under a multiple-award IDIQ contract where the socioeconomic status of the set-aside differs from that of the underlying contract, or the reserve or set aside portion of the underlying contract (e.g., small business set aside multiple-award IDIQ contract where an order is further set aside for SDVOSB concerns). This proposed rule does not apply to orders and blanket purchase agreements placed under Federal Supply Schedule contracts. Promulgation of FAR regulations is authorized by 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113. The legal basis for this rule is SBA's regulations at 13 CFR 126.801, 13 CFR 127.603, 13 CFR 121.1001, and 13 CFR 134.1004 as amended by the three SBA final rules.

This proposed rule will impact small businesses that are or may become multiple-award IDIQ contract holders and that may be awarded orders under multiple-award IDIQ contracts. According to the Federal Procurement Data System (FPDS), in the last three fiscal years (FYs), agencies set aside orders under unrestricted multiple-award IDIQ contracts as follows: 6,509 in FY 2019; 7,392 in FY 2020; and 7,251 in FY 2021; for an average of 7051 per fiscal year. According to FPDS, in the last three fiscal years, agencies further set aside orders under set aside multiple-award IDIQ contracts as follows: 8,403 in FY 2019; 9,470 in FY 2020; and 10,034 in FY 2021; for an average of 9,302 per fiscal

year. According to FPDS, in the last three fiscal years contracting officers required rerepresentation for orders as follows: 363 in FY 2019; 470 in FY 2020; and 530 in FY 2021; which averages out to 454 per fiscal year. According to FPDS, in the last three fiscal years, agencies further set aside orders for a socioeconomic category under the set aside portion of a multiple-award IDIQ contract, where the socioeconomic category differs from the underlying multiple-award IDIQ contract, as follows: 43 in FY 2019; 41 in FY 2020; and 37 in FY 2021; for an average of 40 per fiscal year. This averages out to approximately 4,212 total orders to which this rule may apply per fiscal year. Although we can estimate the number of set aside orders that may be affected by this rule, it is not possible to estimate the number of small entities that may be affected by potential protests as a result of this rule.

The proposed rule does not impose any new reporting, recordkeeping, or other compliance requirements for small entities.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610.

Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2021-009) in correspondence.

VII. Paperwork Reduction Act

This 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. 3501-3521).

List of Subjects in 48 CFR Part 19

Government procurement.

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

Therefore, DoD, GSA, and NASA propose amending 48 CFR part 19 as set forth below:

PART 19—SMALL BUSINESS PROGRAMS

1. The authority citation for 48 CFR part 19 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

2. Amend section 19.302 by—

a. Removing from the end of the second sentence of paragraph (a)(2) “or the SBA.” and adding “or SBA. (See 13 CFR 121.1001(a).” in its place; and

b. Revising paragraph (d).

The revision reads as follows:

19.302 Protesting a small business representation or rerepresentation.

* * * * *

(d) In order to affect a specific solicitation, a protest must be timely. SBA’s regulations on timeliness are contained in 13 CFR 121.1004. SBA’s regulations on timeliness

related to protests of disadvantaged status are contained in 13 CFR 124, Subpart B.

(1) To be timely, a protest by any concern or other interested party must be received by the contracting officer by the close of business of the fifth business day after-

(i) Bid opening for sealed bid acquisitions; or

(ii) Receipt of the special notification from the contracting officer (see 15.503(a)(2)) that identifies the apparently successful offeror for negotiated acquisitions, including-

(A) Partial set-asides and reserves of multiple-award IDIQ contracts; and

(B) Orders that are set-aside under an unrestricted multiple-award IDIQ contract (except for orders and blanket purchase agreements placed under a Federal Supply Schedule contract (see 8.405 and paragraph (d)(5) of this section)); or

(iii) Receipt of notification using other communication means when written notification is not required.

(2) A protest may be made orally if it is confirmed in writing and received by the contracting officer within the 5-day period or by letter postmarked no later than 1 business day after the oral protest.

(3) A protest may be made in writing if it is delivered to the contracting officer by hand, mail, facsimile, email, express or overnight delivery service.

(4) Except as provided in paragraph (d)(6) of this section, a protest filed by the contracting officer or SBA is always considered timely whether filed before or after award.

(5) A protest under a Multiple Award Schedule will be timely if received by SBA at any time prior to the expiration of the contract period, including renewals.

(6) A protest filed before bid opening, or notification to offerors of the selection of the apparent successful offeror, will be dismissed as premature by SBA.

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3. Amend section 19.306 by revising paragraph (e)(1)(ii) and adding paragraph (e)(1)(iii) to read as follows:

19.306 Protesting a firm's status as a HUBZone small business concern.

* * * * *

(e) * * *

(1) * * *

(ii) For negotiated acquisitions, by the close of business on the fifth business day after notification by the contracting officer of the apparently successful offeror, including-

(A) Orders placed under multiple-award indefinite-delivery indefinite-quantity (IDIQ) contracts where the contracting officer requested rerepresentation for the order (see 13 CFR 126.801(d)(1)); and

(B) Orders set aside for HUBZone small businesses under multiple-award IDIQ contracts that are not partially or totally set aside or reserved for HUBZone small business concerns (see 13 CFR 126.801(d)(1)), except for orders and blanket purchase agreements placed under a Federal Supply Schedule contract (see 8.405 and 19.302(d)(5)); or

(iii) Receipt of notification using other communication means when written notification is not required.

* * * * *

4. Amend section 19.307 by-

a. Removing from paragraph (e)(1)(i) "(in sealed bid acquisitions); or" and adding "for sealed bid acquisitions; or" in its place;

b. Revising paragraph (e)(1)(ii); and

c. Adding paragraph (e)(1)(iii).

The revision reads as follows:

19.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.

* * * * *

(e) * * *

(1) * * *

(ii) To be received by close of business on the fifth business day after notification by the contracting officer of the apparently successful offeror for negotiated acquisitions, including-

(A) Orders placed under multiple-award IDIQ contracts where the contracting officer requested rerepresentation for the order (see 13 CFR 134.1004(a)(3)(ii)); and

(B) Orders set aside for service-disabled veteran-owned small businesses under multiple-award IDIQ contracts that are not partially or totally set aside or reserved for service-disabled veteran-owned small business concerns (see 13 CFR 134.1004(a)(3)(i)), except for orders and blanket purchase agreements placed under a Federal Supply Schedule contract (see 8.405 and 19.302(d)(5)); or

(iii) Receipt of notification using other communication means when written notification is not required.

* * * * *

5. Amend section 19.308 by-

a. Removing from paragraph (e)(1)(i) "(in sealed bid acquisitions); or" and adding "for sealed bid acquisitions; or" in its place;

b. Revising paragraph (e)(1)(ii); and

c. Adding paragraph (e) (1) (iii).

The revision reads as follows:

19.308 Protesting a firm's status as an economically disadvantaged women-owned small business concern or women-owned small business concern eligible under the Women-Owned Small Business Program.

* * * * *

(e) * * *

(1) * * *

(ii) To be received by the close of business by the fifth business day after notification by the contracting officer of the apparent successful offeror for negotiated acquisitions including-

(A) Orders placed under multiple-award IDIQ contracts where the contracting officer requested rerepresentation for the order (see 13 CFR 127.603(c) (1)); and

(B) Orders set aside for EDWOSB or WOSB concerns under multiple-award IDIQ contracts that are not partially or totally set aside or reserved for EDWOSB or WOSB concerns (see 13 CFR 127.603(c) (1)), except for orders and blanket purchase agreements placed under a Federal Supply Schedule contract (see 8.405 and 19.302(d) (5)); or

(iii) Receipt of notification using other communication means when written notification is not required.

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